United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,127

STEWART L. UDALL,
SECRETARY OF THE INTERIOR, *ET AL.*,

Appellants

v.

RICHARD L. OELSCHLAEGER,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD L. OELSCHLAEGER,
United States Veterans Hospital
American Lake
State of Washington
Plaintiff,

v.

FRED A. SEATON, Secretary of the Interior and EDWARD WOOZLEY, Director, Bureau of Land Management, for the time being.
Washington 25, D. C.
Defendants.

Civil Action No. 4181–'60

RELEVANT DOCKET ENTRIES

Dec. 29, 1960 – Complaint, appearance filed. Summons, copies (4) and copies (4) of Complaint issued both served 12-30-60, DA Ser. 12-29; AG 1-6-61.

Mar. 9, 1961 – Stipulation to substitute defts. filed. Consent order substituting Stewart L. Udall, Secty. of Interior and Karl E. Landstrom, Dir., Bureau of Land Mgt. as party defts. in place of Fred A. Seaton and Edward Woozley; that defts. have 30 days to answer. (N) Matthews, J.

Mar. 20, 1961 – Answer of defts. to complaint; appearance Ralph S. Boyd; c/mailing filed.

Mar. 21, 1961 – Calendared.

May 12, 1961 – Called Asst. Pretrial Examiner.

Oct. 12, 1961 – First notice under Rule 13.

(Motions and consent orders staying the operation of Rule 13 from 1961 to 1966 are here omitted as not relevant.)

Feb. 14, 1966 – Certificate of Readiness of plaintiff filed.

June 6, 1966 – Appearance of Martin Green as atty. for defts. filed. (AC/N)

June 8, 1966 – Pretrial Proceedings. Assistant Pretrial Examiner.

Oct. 7, 1966 – Motion of pltf. for summary judgment; statement; c/m 10/7/66; P&A's; M.C. 10/7/66.

Oct. 17, 1966 – Stipulation extending to and including 11/-15/66 time for deft. to respond to pltf.'s motion for summary judgment filed.

Nov. 15, 1966 – Stipulation of counsel extending time for defts. to respond to motion for summary judgment to and including 11-28-66, filed.

Nov. 28, 1966 – Cross motions of defts. for summary judgment; statement; P&A memorandum of P&A in opposition to pltf.'s motion for summary judgment; c/m 11-28-66; M.C. 11-28-66.

Dec. 7, 1966 – Stipulation extending to and including 1/5/67 time for pltf. to respond to defts. cross motion for summary judgment, filed.

Jan. 5, 1967 – Answer of pltf. to deft's cross-motion for summary judgment; c/m 1-5-67.

Jan. 17, 1967 – Summary identification of stipulated documents? Exhibits A, A-1, B thru I by pltf.; Exhibit No. 1 by deft. filed.

Feb. 14, 1967 – Motion of pltf. for summary judgment and deft.'s cross-motion for summary judgment heard and taken under advisement (Rep. J. Blair).

Apr. 4, 1967 – Order denying motion of pltf. for summary judgment; cross-motion of defts. denied. (See order for details) (Signed 4-3-67) Matthews, J.

June 1, 1967 – Notice of appeal of defts. (copy mailed to James W. McDade), filed.

June 1, 1967 – Cost of bond on appeal of pltf. in amount of $250.00 with National Surety Corporation, approved and filed.

[Filed Dec. 29, 1960]

COMPLAINT
(For Relief in the Nature of *Mandamus*)

I

This action arises under the Public Land Laws of the United States and particularly the laws pertaining to homesteads on the public domanin, set forth in 43 USC, Secs. 161-263 and 48 USC Secs. 371-378, of which this court has jurisdiction under 28 USC Sec. 1331. Jurisdiction is also invoked under the provisions of 5 USC Sec. 1009.

II

Plaintiff is a citizen of the United States and of the State of Alaska and a veteran, possessed of all necessary legal qualifications to claim, enter and apply for homesteads on the public lands of the United States and presently resides at a United States Veterans Hospital in the State of Washington.

III

Defendants are, respectively, the Secretary of the Interior and Director of the Bureau of Land Management, an agency of the United

States Department of the Interior, (hereinafter referred to as the Department), said defendants being incumbents of said offices for the time being, and are sued herein in their respective official capacities. Plaintiff prays leave to amend his complaint to substitute as defendants the respective successors in office of either of said defendants, from time to time, as may be necessary.

IV

As part of their official duties, defendants are charged with the administration of the public land laws, including the homestead laws aforesaid, with respect to the public domain of the United States in the State of Alaska and elsewhere. These duties include, but are not limited to, the adjudication of, and administrative action on, homestead entries and applications, the examination of final proof, the issuance of final certificates of title and the issuance of patents.

V

The land and improvements which are the subject matter of this controvery are, and at all times material herein were, a part of the vacant, unappropriated public domain of the United States in the State (formerly the Territory) of Alaska, subject to the application of the public land laws and homestead laws aforesaid, and exceed in value the sum of $10,000.00.

VI

From and after the early part of 1954, plaintiff established residence on a homestead claim on unsurveyed, vacant, unappropriated public lands, situate in Township 11 North, Range 3 West, Seward Meridian, Alaska (hereinafter referred to as the homestead) and on April 21, 1954 filed his formal appliation for such homestead, pursuant to the applicable provisions of the homestead laws of the United States. From and after such date plaintiff fully com-

plied with and completed all of the legal requirements of said laws for acquisition of title to said homestead, by completing the full period of residence on the land so required, building a habitable dwelling house on the land, together with other improvements, and clearing and cultivating the same for agricultural purposes and subsequently filed his final proof of such compliance, in accordance with law, on April 20, 1955. Supplemental evidence completing such final proof was filed by plaintiff on June 14, 1955 in accordance with requirements of the Bureau of Land Management (hereinafter referred to as the Bureau).

VII

By virtue of the foregoing, plaintiff became and ever since has been entitled to issuance of a final certificate of title and of a United States patent to the land embraced in the homestead aforesaid, said land having been officially surveyed by the United States in the meantime, and nothing further remaining to be done on the part of the United States, except the ministerial set of issuing such certificate and patent.

VIII

Not withstanding the foregoing, the defendants, and each of them, their agents and subordinates, have failed and refused to issue such certificate or patent and have purported to reject plaintiff's homestead application, entry and final proof, with color of proper legal authority and in direct violation of the mandatory ministerial duty imposed upon said defendants, although said defendants have been requested repeatedly to do so.

IX

In addition to the foregoing, the defendants, although repeatedly requested to do so, have failed and refused and continue to fail and

refuse to grant to plaintiff an administrative hearing or to give him an opportunity to present reasons or evidence, as the need may arise, to prove his entitlement to said homestead, or to disprove whatever facts may have been erroneously assumed by defendants as the basis for their failure to act as above set forth.

X

In addition to the foregoing, defendants, through their agents and subordinates, have purported to direct plaintiff to relinquish possession of his said homestead and the permanently affixed improvements thereon, have threatened and continue to threaten to evict him therefrom and to deprive him of his right, title and interest therein and thereto without a hearing and without color of title of law, and hence without due process of law, in violation of Amendment V to the Constitution of the United States.

XI

Plaintiff has fully and completely exhausted each and every administrative remedy available to him under and pursuant to the rules, regulations and practices of the department and bureau aforesaid, including the prosecution of administrative appeals through all available stages and seeking redress, by petition, directly from the defendant Fred A. Seaton, as head of said department and as the superior of the defendant Edward Woozley, director of said bureau, but without avail.

XII

Plaintiff is without any adequate or speedy legal remedy and unless relieved by this Honorable Court will be deprived of the aforementioned land and improvements by ouster and eviction therefrom, and removal or destruction of the improvements erected thereon, and said homestead claim may become subject to the attachment of

intervening equitable rights of innocent third parties, all to plaintiff's great and irreparable damage.

WHEREFORE, plaintiff prays that this Honorable Court render its judgment ordering and directing the defendants, and each of them,

(1) to perform their respective functions and duties so as to issue to plaintiff a final certificate and patent to and for the above-described homestead; or, in the alternative,

(2) in the event that it be found and determined that there are unresolved issues of fact which must be adjudicated before the legal right of plaintiff to such final certificate and patent can be finally established, then and in that event, that this Honorable Court render its judgment ordering and directing the said defendants to grant to plaintiff a prompt and impartial administrative hearing, at a time and place conveniently accessible to plaintiff and his witnesses, for the purposes of determining such issues of fact, if any there be; and

(3) that this Court declare, adjudge and decree the right, title and interest, legal or equitable, in and to the homestead which is the subject matter of this controversy; and

(4) that plaintiff be granted such other and further relief to which in the premises he may be justly entitled.

DATED: December 29th, 1960.

/s/ Peter Paul Hanagan
733 Tower Bldg., Wash., 5, D.C.

RICHARDS, WATSON, SMITH & HEMMERLING

/s/ Edgar Paul Boyke

Attorneys for Plaintiff.

[Filed Mar. 20, 1961]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD L. OELSCHLAEGER
Plaintiff,

v.

STEWART L. UDALL
SECRETARY OF THE
INTERIOR

and

KARL E. LANDSTROM,
DIRECTOR OF LAND
MANAGEMENT,
Defendants.

Civil Action No. 4181-60

ANSWER OF THE DEFENDANTS

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted against the defendants or either of them.

SECOND DEFENSE

The land for which plaintiff seeks a patent was withdrawn from all forms of entry or appropriation by Public Land Order No. 576, dated March 29, 1949 (43 C.F.R., 1953 Supp., p. 258; 14 F.R. 1614) and still remains withdrawn from entry or appropriation.

THIRD DEFENSE

I

The defendants are advised and believe that the allegations in paragraph I of the complaint are conclusions of law which do not

require answer and, therefore, those allegations are neither admitted nor denied.

II

The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph II of the complaint.

III

The defendants admit that they are, respectively, the Secretary of the Interior and the Director of the Bureau of Land Management.

IV

The defendants admit the allegations in paragraph IV of the complaint except that they aver that the defendant, Landstrom, has authority to issue patents only by delegation from the defendant, Udall.

V

The defendants deny that the lands in Sections 3 and 10, Township 11 North, Range 3 West, Seward Meridian, Alaska, for which plaintiff seeks a patent, were at any time pertinent in this action vacant, unappropriated public lands of the United States and on the contrary the defendants aver that at all times since March 29, 1949, those lands have been withdrawn from entry or appropriation by Public Land Order No. 576 (43 C.F.R., 1953 Supp., p. 258; 14 F.R. 1614). The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation as to the value of the land and the improvements thereon.

VI

The defendants deny that plaintiff established residence on vacant, unappropriated public lands of the United States and, on the

contrary, they aver that the lands were withdrawn from all forms of entry and appropriation as alleged in paragraph V above.

The defendants admit that plaintiff filed with the Land Office at Anchorage, Alaska, his settlement location notice, his application for homestead entry and that on April 20 and June 14, 1955, he filed his final proof, which documents were assigned serial number Anchorage 026482, but defendants aver that plaintiff's application for a patent was denied because the land for which plaintiff seeks a patent was at all pertinent times withdrawn from entry and appropriation.

As to the remaining allegations in paragraph VI of the complaint, defendants aver that the matters of fact there alleged are confided by law to the Secretary of the Interior for determination and that those matters have not been determined by him because the ground upon which plaintiff's application was rejected made other determinations of facts unnecessary.

VII

The defendants are advised and believe that the allegations in paragraph VII of the complaint are conclusions of law which do not require answer and, therefore, those allegations are neither admitted nor denied.

VIII

The defendants admit that they have rejected plaintiff's application to enter the land as a homestead and that they refuse to issue plaintiff a patent for the land. Otherwise the defendants deny the allegations in paragraph VIII of the complaint.

IX

The defendants deny the allegations in paragraph IX of the complaint.

X

The defendants admit that plaintiff has been warned that, if he fails to remove his improvements from the land, they will become the property of the United States. Otherwise the allegations in paragraph X of the complaint are denied.

XI

The defendants admit that plaintiff has exhausted his administrative remedies.

XII

The defendants admit that they will continue to refuse to issue a patent to the plaintiff and that they will, by appropriate means, assert and enforce the rights of the United States in the lands for which plaintiff seeks a patent.

WHEREFORE, having fully answered, the defendants pray that the complaint be dismissed and that they have judgment against the plaintiff for costs.

/s/ Ralph S. Boyd
Attorney, Department of Justice
Attorney for Defendants

[Certificate of Service]

[Filed June 8, 1967]

PRETRIAL PROCEEDINGS
STATEMENT AND NATURE OF CASE

Complaint to require issuance of final certificate and patent to homestead in Alaska, or alternatively, to remand for administrative hearing.

UNDISPUTED FACTS:

In or about March of 1954 plaintiff established residence upon a homestead claim on then unsurveyed lands south of Anchorage, Alaska, in the vicinity of Turnagain Arm. He filed a location notice in accordance with law on April 1, 1954, and was assigned Serial No. Anchorage 026482. Said location notice described the lands upon which settlement was commenced as set forth in detail in Paragraph 2 of the detailed stipulations attached hereto.

On December 22, 1954, an official public land survey of Township 11 North, Range 3 West, Seward Meridian, Alaska, was officially filed.

The description of the land as to which P had filed a notice of homestead entry, when superimposed upon the official plat of said survey, showed the lands described in the notice of location to comprise approximately 100 acres in Sections 3 and 10 of Township 11 North, Range 3 West, Seward Meridian, Alaska.

On April 6, 1949, by Public Land Order 576 (14 FR 1614), the Secretary of the Interior had withdrawn from all forms of appropriation under the Public Land Laws a strip of land approximately 10 miles long, "parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm * * *." At the time of the issuance of Public Land Order 576, the Public Land Surveys of the United States had not been extended to the lands described in that order.

On January 31, 1955, P filed an application for homestead entry, and on April 20 and June 14, 1955, P filed final proof documents.

On Novemver 19, 1956, the manager of the Anchorage Land Office issued a decision rejecting P's homestead location notice, application to enter, and final proof, on the ground that the lands applied for had been withdrawn from entry under the Public Land Laws at the time of the initiation of P's claim. The manager's decision was based upon the fact that the official plat of survey of Township 11 North, Range 3 West, Seward Meridian, Alaska, shows the lands entered by the P to be within one mile of the meander line of Turnagain Arm.

On Oct. 23, 1959, the Director of the Bureau of Land Management issued a decision affirming the manager's decision, and on June 27, 1960, the Solicitor of the Department of the Interior issued a decision affirming the decision of the Director.

This action was initiated December 29, 1960 against the Secretary of the Interior and the Director, Bureau of Land Management, who are charged with administering the laws relating to the public lands of the United States and particularly the laws pertaining to the homesteads in the public domain (43 U.S.C. §161 et seq. and 48 U.S.C. §371 et seq.).

More detailed stipulations with respect to facts which may be relevant and admission of certain documents are attached hereto and made a part hereof.

The lands in issue are within one mile of the surveyed meander line of Turnagain Arm and said lands adjoin lands as to which patents have been issued to one Mely, and Louis Oelschlaeger.

PLAINTIFF requests that the Court find that the Department of the Interior is estopped by law to deny him patent to the lands in question and to direct the Secretary of the Interior to comply with the Homestead Statute and issue patent for the reasons:

(a) That the lands in question were available for homestead entry and were not withdrawn as a matter of law, in accordance with the holdings of the Supreme Court of the United States in *Borax Consolidated, Ltd. v. City of Los Angeles,* (296 U.S. 10; 80 L Ed 9), and the United States Court of Appeals for the 9th Circuit, in *United States v. State of Washington* (294 F.2d 830), which State holds "mean high tide" to be (not the *Meander* line), but the average of all tides over a period of 18.6 years.

(b) That the lands in question were available for homestead entry and were not withdrawn as a matter of law in view of that finding by the United States Land Office, Bureau of Land Management, Anchorage, Alaska, in the case of Thomas M. Mely, Anchorage 015927, a contest proceeding to which the Department of the Interior was a party, and from which finding the Department took no appeal.

(c) That the lands in question were available for homestead entry and not withdrawn, in view of the nature of the purported withdrawal and the fact that the purpose for which the lands had been withdrawn (namely, construction of a public highway) had ceased to exist two years prior to the date P made his homestead entry.

P requests that the Court direct the Secretary of the Interior to issue patent covering his homestead entry on the basis that he has completed all of the requirements of law and is therefore entitled by law to patent for the lands in question.

Alternatively, if the Court should find that there are unresolved issues of fact, resolution of which is within the particular competency of the Department of the Interior, P requests that the Court remand the case to the Department of the Interior.

P asserts that the Interior Department, in finding that the lands entered by P are within the withdrawn area, did so on the basis that the phrase in Public Land Order No. 576 "line of mean high tide" is equivalent to the phrase "surveyed meander line" and is not an unchanging elevation to be scientifically measured and determined over a period of years, as held by the Supreme Court in the *Borax* case; that the Department made this finding in spite of the fact that, concurrent with its issuance of the decision in this case, it was urging in the U.S. Court of Appeals for the Ninth Circuit that the Supreme Court's definition in the *Borax* case be adopted.

P asserts that if the lands entered by Mely and Louis Oelschlaeger are not within the withdrawn area, then P's entry is not within the withdrawn area and that the patents to both of said persons issued after the land was surveyed.

Defendant denies that P is entitled to any of the relief prayed.

D asserts that there are no controverted issues of fact in the case, and that the issue of law is whether the decision of the Secretary of the Inteior and his delegated officers namely, that "the line of mean high tide" referred to in Public Land Order 576 is one and the same as the meander line of Turnagain Arm shown on the official survey of Township 11 North, Range 3 West, Seward Meridian, Alaska is reasonable. D contends that his decision is fully supported by the authorities and is correct as a matter of law.

Defendant does not agree with P's interpretation of the Borax decision, which involved a different set of facts, and asserts that the Mely and Louis Oelschlaeger patents were issued in error and do not create an estoppel as to P's claim.

STIPULATIONS:

Facts above under "UNDISPUTED FACTS" and additional stipulations signed by both counsel, attached hereto and made a part hereof, with the limitation therein set forth.

It is stipulated that the documents described in the attached "Stipulations" and any other documents initialled by both counsel prior to trial may be admitted without formal proof of authenticity, subject to all other objections.

Counsel for D states that he expects to have some further documents (pictures) prior to trial. The Examiner has instructed both counsel that if they have any additional documents prior to trial, they should exhibit them to opposing prior to trial for the purpose of obtaining a stipulation as to admission without formal proof of authenticity, subject to all other objections, and if such stipulation not be made, as to any document, such document be presented to her for identification and a possible addendum to this pretrial order prior to trial.

Counsel at pretrial agreed that cross motions for summary judgment should be filed.

If the Court should deny summary judgment and a trial is to be had, counsel will exchange the names and addresses of all witnesses known to them, including experts but exclusive of impeachment witnesses, within two weeks after denial of summary judgment, filing a copy of their witness list with the Clerk of the Court, and will file supplemental witness list if any additional witnesses should be learned of thereafter.

Counsel for the Government states that the only possible witness now known to him is:

Clark Gumm — Chief Cadastral Engineer
Bureau of Land Management
Department of the Interior

and that he will not file a witness list unless he learns of additional witnesses.

/s/ Elizabeth Bunten
Assistant Pretrial Examiner

TRIAL ATTORNEYS:

/s/ James W. McDade For Plaintiff
/s/ Martin Green For Defendants

[Filed June 8, 1966]

STIPULATIONS WITH RESPECT TO CERTAIN FACTS AND ADMISSION OF RECORDS AND DOCUMENTS INTO EVIDENCE

The parties hereto, by their respective counsel, hereby mutually agree and stipulate with respect to the truth of certain facts and the admission into evidence of certain records and documents, as follows:

1. The stipulations to follow are limited to the purposes of the above-entitled case and represent an agreement only as to certain facts stated therein or the authenticity of documents or copies of documents annexed thereto. No party shall be deemed foreclosed from objecting either to the facts or the documents on grounds of irrelevancy or immateriality and both plaintiff and defendants shall be free to offer such additional evidence as may appear proper, except for the purpose of contradicting the facts stipulated or impeaching the authenticity of the documents referred to above.

2. In or about March of 1954, plaintiff established residence upon a homestead claim on then unsurveyed public lands south of Anchorage, Alaska. He filed a location notice in accordance with law on April 21, 1954, and was assigned Serial No. Anchorage 026482. Said location notice described the lands upon which settlement was commenced by metes and bounds, which, when surveyed, would probably be W1/2SE1/4SW1/4 of Section 3; and the E1/2NW1/4 of Section 10, all in T. 11 N., R. 3 W., Seward Meridian, Alaska, embracing 100 acres, more or less.

3. Plaintiff's contentions as to the relative locations of his said claim and those of the adjoining claims of Thomas N. Mely (Anchorage 015927), Lewis Oelschlaeger (Anchorage 018722) and Robert O. Pennington (Anchorage 024014) are shown on the attached Plaintiff's Exhibit A which may be admitted in evidence for the limited purpose of showing plaintiff's said contentions. Defendants' contentions with respect to such relative locations are shown on the attached Defendants' Exhibit No. 1, being a true copy of a township plat of Township 11 North, Range 3 West, Seward Meridian, Alaska, accepted October 28, 1954, and officially filed on December 22, 1954. Said Defendants' Exhibit No. 1 may be similarly admitted into evidence to show defendants' contentions in this respect. The annexed copies of Plaintiff's Exhibit A and Defendants' Exhibit No. 1 are submitted solely for the purposes of showing the conflicting positions of the respective parties.

4. On December 22, 1954, a plat of survey was officially filed, having been accepted on October 28, 1954, showing a certain portion of the public lands, including plaintiff's claim. A true copy of said plat is attached hereto as Defendants' Exhibit No. 1, for the purposes aforesaid. On January 17, 1955, plaintiff was advised by the Anchorage Land Office of the United States Department of the Interior of the filing of the plat and instructed as set forth in a let-

ter of said date, attached hereto as Plaintiff's Exhibit A-1. Accordingly, on January 31, 1955, plaintiff filed a homestead entry application for surveyed lands.

5. On April 20, 1955, plaintiff filed his final proof. Supplemental evidence in support of said final proof was filed by plaintiff on June 14, 1955, and again on November 30, 1955. On April 5, 1956, plaintiff's application was filed "under conflict" by the Anchorage Land Office, pursuant to a memorandum and status report dated May 13, 1954, addressed to the Manager of the Anchorage Land Office by Leonard M. Berlin, Area Chief, Division of Engineering, Bureau of Land Management, which states in pertinent part as follows:

> "In accordance with the decision rendered in the Mely case, Anchorage 015927 and the field report TA 4803 of September 29, 1953, reporting on Anchorage 018-722, Lewis Oelschlaeger homestead (which) stated 'it is found to be a fact that the Mely entry was not within the one-mile reserve (P.L.O. 576) mentioned *supra*, no portion of the Oelschlaeger entry is affected by the withdrawal.'
>
> "Following this thinking, that part of the applicant's (plaintiff's) location described as W1/2SE1/4SW1/4 of Sec. 3, T. 11 N., R. 3 W., S.M., which lies between the Mely and Lewis Oelschlaeger entries would be open to entry. In the absence of other proof, that part of unsurveyed Sec. 10, T. 11 N., R. 3 W., S.M., described as E1/2NW1/4 would be within the boundaries of P.L.O. 576. That part of Sec. 3 included in this application has been subdivided into five-acre tracts but an official plat is not yet available."

6. On or about May, 1949, one Thomas N. Mely established residence on a homestead claim and on April 25, 1950, filed a petition for free survey of his said homestead settlement claim under Serial No. Anchorage 015927. Plaintiff's contentions as to the rela-

tive location of the said Mely entry with respect to the entry of the plaintiff are shown on the attached Plaintiff's Exhibit A. Defendants' corresponding contentions are shown on the attached Defendant's Exhibit No. 1.

7. On October 5, 1950, the manager of the Anchorage Land Office rejected Mely's application (referred to in item 5 above) on the ground of an alleged conflict with Public Land Order No. 576. On December 14, 1950, Mely submitted additional evidence which resulted on November 14, 1951, in a remand of the case to the said manager with instructions to hold a hearing. A hearing was held on May 26, 1952, for the purpose of deciding a contest brought by the United States Department of the Interior against Mely's homestead entry, on the basis that the land was withdrawn by P.L.O. 576 when settlement was made. As a result of such hearing, the acting manager of the Anchorage Land Office, by decision dated February 13, 1953, dismissed the Department's contest on the ground that the government had not sustained the burden of showing the alleged conflict of the settlement claim with the withdrawal. The acting manager also held that the decision of October 5, 1950 was a nullity because it was based upon a confidential investigative report. This decision was appealed by the government to the Director of the Bureau of Land Management who, by decision dated April 13, 1953, reversed the manager's decision and remanded the case for proceedings *de novo*, holding that although the manager's decision was correct in vacating the prior purported decision of October 5, 1950, as a nullity (because based upon confidential investigative reports), nevertheless a new hearing should be held to determine the question whether the land or part of it was withdrawn when the homestead settlement was made and whether it has been established that the settler complied with the laws as to residence and improvements. Thereafter, a new government contest was instituted against Mely's settlement claim and hearings were held before the acting

manager of the Anchorage Land Office on August 12 and 13, 1953. On September 3, 1953, the acting manager rendered his decision rejecting the petition for free survey on the ground of insufficient residence, without prejudice to Mely's submission of subsequent proof of additional compliance with residence requirements. The decision contained the following finding of fact:

> "With reference to the contention that the land settled upon by Mely was withdrawn by Public Land Order 576 of March 29, 1949 (14 F.R. 1614), which reserved a strip of land a mile wide 'beginning at the SE corner of Sec. 33, Township 12 North, Range 3 West, Seward Meridian, thence southeasterly 10 miles, parallel to and one mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of the Chugach National Forest', the evidence shows that the Thomas N. Mely homestead, as described in his petition under Anchorage Serial No. 015927, does not lie, either in whole or in part, within a distance of one mile from the line of mean high tide of Turnagain Arm, and hence is not in conflict with P.L.O. 576, referred to above."

8. On or about August 4, 1949, Lewis Oelschlaeger, the stepfather of the plaintiff herein, initiated a homestead settlement claim on unsurveyed lands adjacent to the aforementioned Mely homestead claim under Anchorage Serial No. 018722.

9. On April 27, 1955, a United States patent was issued to Thomas N. Mely for his homestead claim as shown on Plaintiff's Exhibit A; and on October 10, 1955, a United States patent was issued to Lewis Oelschlaeger for his homestead claim as shown on Plaintiff's Exhibit A herein.

10. By letter dated October 21, 1956, plaintiff, through his attorney, requested action on his homestead settlement claim Anchorage 026482, which is the subject matter of this action. A copy

of said letter is attached hereto as Plaintiff's Exhibit B and may be admitted in evidence.

11. On November 19, 1956, the manager of the Anchorage Land Office issued a decision rejecting plaintiff's homestead location notice, application to enter and final proof. A copy of said decision is attached hereto as Plaintiff's Exhibit C and may be admitted in evidence.

12. On December 18, 1956, plaintiff filed a notice of appeal from the aforementioned decision of the manager, Anchorage Land Office, dated November 19, 1956, a copy of which notice of appeal, together with brief in support thereof dated January 26, 1957, is attached hereto as Plaintiff's Exhibit D and may be admitted in evidence.

13. On October 23, 1959, the Director, Bureau of Land Management, issued a decision affirming the manager's decision thus appealed from. A copy of this decision is attached hereto as Plaintiff's Exhibit E and may be admitted in evidence.

14. On December 7, 1959, plaintiff filed a notice of appeal from the last-mentioned decision of the Director, Bureau of Land Management to the Secretary of the Interior. A copy of such notice of appeal, together with copies of statements of reasons in support thereof dated February 3, 1960, and March 17, 1960, is attached hereto as Plaintiff's Exhibit F and may be admitted in evidence.

15. On June 27, 1960, the Solicitor of the United States Department of the Interior, acting pursuant to authority delegated to him by the Secretary of the Interior, issued a decision affirming the decisions of the Director and manager appealed from and referred to in the preceding paragraphs. A copy of the Secretary's decision is attached hereto as Plaintiff's Exhibit G and may be admitted in evidence.

16. On July 11, 1960, and October 31, 1960, plaintiff submitted to the Secretary of the Interior informal petitions for reconsideration or modification of the last-mentioned decision. Copies of the correspondence containing these petitions are attached hereto as Plaintiff's Exhibit H and may be admitted in evidence.

17. On January 31, 1961, receipt of the aforementioned correspondence was acknowledged by the Deputy Solicitor of the United States Department of the Interior and reconsideration was denied. A copy of the last-mentioned letter from the Deputy Solicitor of the United States Department of the Interior is attached hereto as Plaintiff's Exhibit I and may be admitted in evidence.

Respectfully submitted,

McINTOSH & McDADE

By /s/ James W. McDade
Attorneys for Plaintiff

/s/ Martin Green
Attorney for Defendants

(Defendants' Exhibit 1 and Plaintiffs' Exhibit A, a plat and map, respectively, are bound at the end of this volume)

[Filed Jan. 17, 1967]

PLAINTIFF'S EXHIBIT C

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
Anchorage, Alaska

Nov 19, 1956

Certified Mail
Return Receipt Requested

DECISION

Richard L. Oelschlaeger
c/o Edgar Paul Boyko, Atty.
523 Third Avenue
Anchorage, Alaska

Anchorage 026482
Homestead 1.0

Homestead Location Notice, Application to to Enter, and Final Proof Rejected

On April 21, 1954, Richard L. Oelschlaeger filed a notice of location of homestead settlement claim describing the land as, what will be when surveyed, the W1/2SE1/4SW1/4, Section 3, and the E1/2NW1/4, Sec. 10, T. 11 N., R. 3 W., Seward Meridian.

On March 29, 1949, the land mentioned above was withdrawn from all forms of appropriation under the public land-laws for public purposes by Public Land Order No. 576. The location notice was never accepted by the Land Office, since a status check disclosed that it was impossible to determine the boundaries of Public Land Order No. 576 until the land had been surveyed and a determination and adjustment made of the boundaries of the withdrawal to line of legal subdivision of the plat. Such a determination was made November 8, 1954, in accordance with Department of the Interior regula-

tions (42 L.D. 318), by the Director, Bureau of Land Management, Washington, D.C., and in accordance with this determination the lands applied for fall within the boundaries of Public Land Order No. 576, and are not open to entry.

The plat of survey was officially filed December 22, 1954, and, in accordance with prescribed procedure, Mr. Oelschlaeger was advised of the filing of the plat and that a homestead entry application should be filed for surveyed land. The homestead entry application was filed January 31, 1955, and to date no notice of allowance has been issued.

Mr. Oelschlaeger was never notified that the land was open to settlement or entry. He and his Father, who had an adjoining homestead, were advised verbally at the Land Office on several occasions of this conflict and that settlement was at their own risk. Since no valid rights to land can be acquired while in a withdrawn status, the location notice is hereby rejected. (Anne V. Hestnes, A-27096, June 27, 1955; Rafael D. Tobar, A-27008, December 13, 1954).

Also, since a homestead entry must be rejected if the land applied for is reserved from entry when the application is filed, and cannot be suspended pending re-opening of the land to entry, the homestead application of Oelschlaeger is rejected together with his final proof.

Fees and commissions will be returned by separate voucher.

This decision may be appealed to the Director of the Bureau of Land Management in accordance with the regulations (43 CFR 221), pertinent parts of which are attached. A Notice of Appeal which is filed in this office more than thirty (30) days after your receipt of the decision, or which though timely filed is not accompanied by a $5.00 filing fee, will not be considered.

/s/ Virgil O. Seiser
Manager

[Filed Jan. 17, 1967]

PLAINTIFF'S EXHIBIT E

PUBLIC LANDS	* 3 *Boundaries and Surveys* * 7 *Withdrawals*
WORDS AND PHRASES	* 1 *Generally* (Line of Mean High Tide)

A public land order withdrawing from all forms of appropriation under the public land laws an unsurveyed strip of land one mile wide, one boundary of which is "the line of mean high tide," and the opposite boundary of which is a line, "parallel to and one mile distant from the line of mean high tide," describes the withdrawn area with sufficient precision so that the publication of the order in the Federal Register constitutes constructive notice of the withdrawal to all persons affected thereby, and precludes the acquisition of any rights to the land by a person subsequently settling on any portion of the withdrawn area.

The phrase, "line of mean high tide" is used in Public Land Orders to signify that line which would be meandered by the cadastral engineer in accordance with practices developed when the same line was designated by such terms as "line of ordinary high tide," "high water mark," "high water line," "that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest," and similar phrases.

The practice in public land surveys of running a meander line with reference to the physical effect of the water's action upon the land, as evidenced by the presence of an escarpment, or the absence of vegetation, is a correct procedure, having the sanction of long usage.

A meander line as depicted on the plat of a correctly executed survey of littoral areas is conclusive as to the limits of the public

lands, and binds all agents of the Bureau, until such time as it is amended or corrected by competent authority.

Robert Omar Pennington, Richard L. Oelschlaeger, Anchorage 024-014, 026482 (October 23, 1959)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 23, 1959

Certified Mail
Return Receipt Requested

DECISION

Robert Omar Pennington
Richard L. Oelschlaeger Homestead

Manager's Decision Affirmed

Richard L. Oelschlaeger and Robert Omar Pennington have appealed to the Director of the Bureau of Land Managmeent from decisions of the Manager of the Anchorage, Alaska, Land Office, rejecting their notices of location for homestead settlements, their applications for homestead entry, and their offers of final proof, on the ground that the lands applied for were withdrawn from all forms of appropriation under the public land laws by Public Land Order 576.

Public Land Order 576 was published in the Federal Register (14 F.R. 1614) on April 6, 1949, and provides that:

> "By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, 3 CFR 1943 Cum. Supp., and section 4 of the

act of May 24, 1928, 45 Stat. 729 (49 U.S.C. 214), it is ordered as follows:

* * *

"Subject to valid existing rights and withdrawals, the public lands within the following-described areas are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws, and reserved as follows:

* * *

"(5) Under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward highway:

"Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S.M., thence by metes and bounds,

"Southeasterly, 10 miles, parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;

"South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;

"Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.,

"East, 1-1/4 miles along south boundary of secs. 32 and 33 to point of beginning.

"The area described contains approximately 6,700 acres."

The appellants contend, in identical statements of reasons, (1) that the land included in their notices of location is not within the boundaries of Public Land Order No. 576; (2) that Public Land Order No. 576 is not based upon any valid statutory authority, and is therefore null and void; and (3) that by submitting final proof they have "an equitable right to the land and, in the absence of fraud or other legal reasons for invalidating final proof, [are] entitled to

patent." It is also argued that the Land Office "in accepting the entryman's final proof, is estopped from denying the validity of, or rejecting the location notice filed herein."

I

Whether or not the land embraced in the appellants' homestead applications has been withdrawn from entry by Public Land Order 576 depends upon the location of the "line of mean high tide," which is the western boundary of the withdrawn area. The eastern boundary is a line parallel to and one mile distant from the western boundary. The appellants maintain that it has already been settled, in the case of *Thomas N. Mely*, Anchorage 015927, decided by the Acting Manager of the Anchorage Land Office on September 3, 1953, that the land for which they have applied is not within the withdrawn area. Although the history of the *Mely* case is involved, and sometimes confused, it must be reviewed here in order to determine its applicability in the instant case.

In May, 1949, Mr. Mely settled on a tract of land in the general area of the withdrawal, and in 1950 he filed a petition for free survey of his homestead. The Anchorage Land Office then attempted to determine whether or not his claim was within the reserved area.

Turnagain Arm, the western boundary of the withdrawal, is a branch of Cook Inlet, which in turn is a branch of the Gulf of Alaska. In the vicinity of the withdrawn area, there stretches, between what is definitely the upland, and what is definitely the line of low tide, a wide expanse of extremely level mud flats. This area is so nearly horizontal, and so large, that the raising of the level of the water by only a fraction of an inch is sufficient to inundate several hundred acres. Conversely, the slightest lowering of the water's level exposes a large area of mud flats.

When the question of establishing the line of mean high tide was raised, Mr. Mely contended that that line was actually some dis-

tance out on the mud flats, and that the land on which he had settled was not within one mile of the line of mean high tide, and consequently not within the withdrawn area. Two hearings were held; at each hearing, a cadastral engineer, who was then in the process of surveying the area for the Bureau of Land Management, testified as to the location of the line of mean high tide.

Although the transcript of the second hearing is not available, it appears that the testimony of the cadastral engineer in that hearing was substantially different from his testimony in the first. Also, at the second hearing, Mr. Mely submitted in evidence a report by Mr. Victor C. Rivers, a registered engineer, to the effect that the Department of the Interior's concepts as to the location of the line of mean high tide are not scientifically precise, and that his own observations showed the line of mean high tide to be a considerable distance out on the mud flats. Accordingly, Mr. Rivers concluded that the Mely homestead was not within one mile of the line of the mean high tide, and thus not affected by the withdrawal.

This position prevailed and, although the petition for free survey was rejected, the Acting Manager found that Mr. Mely's homestead was not within the withdrawn area. Subsequently the official survey was completed by the cadastral engineer who had testified at the hearing; the plat of survey was accepted and filed, and patent issued to Mr. Mely. Also, on the basis of the Mely decision, patent has issued to Mr. Louis Oelschlaeger (the father of Richard, the appellant in this case), whose homestead is located immediately east of the Mely homestead. The appellants argue that since the Mely homestead was found not to be within the withdrawn area, their own proposed homesteads which, like the Louis Oelschlaeger homestead, are east of the Mely homestead, must also be outside the ambit of the public land order.

However, the decision in the *Mely* case is not applicable in the situation presented by the instant appeals. At the time of the Mely

hearing, the area had not been surveyed. The purpose of the hearing was to determine whether the Mely homestead was within the withdrawn area. Had the land been surveyed, this would already have been known. Since the time of the Mely hearing, the area has been surveyed, and the proposed homesteads of both appellants (as well as the patented homestead of Mr. Mely) have been found to be on withdrawn lands. The Manger's refusal to allow the homestead entries on this land was therefore correct.

It appears that in reaching a decision in the *Mely* case, where it was held that a homestead entry in the same area was *not* on withdrawn land, the Acting Manager considered *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10 (1935) to be controlling. It is now urged that the *Borax* case governs here, also, and requires the approval of the appellants' homestead applications.

The *Borax* case was an action by the City of Los Angeles to quiet title to what was claimed to be the tideland of an island in Los Angeles Harbor. The area in dispute was composed of mud flats, "the surface of which is in places almost horizontal, and in other places the plane of the surface forms a very acute angle with the horizontal so the small additional rise of the tide will result in the flooding of a large area of ground." These mud flats were very valuable; as much as $49,000 per acre had been paid for land on the island.

The island had been surveyed in 1880, after the admission of California into the Union, and patented in 1881 to one William Banning, to whom Borax Consolidated traced its title. The District Court held that since none of the land involved in the suit was shown on the plat of survey to have been tideland, or below the line of mean high tide of the Pacific Ocean, or Los Angeles Harbor, and that, since the action of the General Land Office involved determinations of questions of fact that were within its jurisdiction and

were especially committed to it by law for decision, its determinations, including that of the correctness of the survey, were final and were binding upon the State of California and the City of Los Angeles, as well as upon the United States. The Court of Appeals reversed the District Court, and the Supreme Court affirmed the action of the Court of Appeals.

The Supreme Court held that the question of whether land is tideland, and thus under the jurisdiction of a State, or upland, and thus under the jurisdiction of the Federal Government, is appropriately one for judicial decision upon the evidence. The Court stated that although the boundary of the upland is the high water mark, that term "does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides." The Court went on to define the mean high tide line as "neither the spring tide nor the neap tide, but a mean of all the high tides," and then concluded:

> "In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that 'Mean high water at any place is the average height of all the high waters at that place over a considerable period of time,' and the further observation that 'from theoretical considerations of an astronomical character' there should be 'a periodic variation in the rise of water above sea level having a period of 18.6 years, the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, 'an average of 18.6 years should be determined as near as possible.' We find no error in that instruction."

The appellants have relied heavily on the manner of determining "mean high tide" used by the Coast and Geodetic Survey and recommended by the Supreme Court, and have argued that the fail-

ure of the Bureau of Land Management to determine mean high tide in this same manner necessarily indicates that the Bureau's line of mean high tide has been incorrectly ascertained.

However, it is not the function of this Bureau to determine lines of mean high tide, *per se.* This Bureau is by statute charged with the duty of surveying the public lands of the United States. 43 U.S.C., 1952 ed., sec. 2. The Bureau's survey of public lands does not ascertain boundaries, but creates them. *Cox v. Hart,* 260 U.S. 427, 436 (1922).

Surveys creating, reestablishing, marking and defining boundaries are called cadastral surveys. Such surveys, unlike scientific surveys of an informative character which may be amended with changing conditions or because they are not executed according to the standards now required for accuracy, cannot be ignored, repudiated, altered or corrected, and the boundaries created or reestablished cannot be changed so long as they control rights vested in the lands affected.[1]

The Coast and Geodetic Survey has a function different from that of the cadastral engineers. Its work is to reduce to a common level, or datum plane, soundings taken at different stages of the tide; determine tidal datum planes for general engineering work; derive data for the prediction of the tides; secure information pertaining to the mean and extreme rise and fall of the tide which may be necessary in the construction of piers, bridges, and other structures for which the tidal condition is an important factor, and secure data for the study of crustal movements in the earth.[2] The maps prepared by Coast and Geodetic Survey reflect this information, and are of inestimable value to those who use them.

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[1] *Modern Cartography – Base Maps for World Needs,* United Nations, 1944, p. 64.

[2] *Manual of Tide Observations,* U.S. Department of Commerce, Coast and Geodetic Survey, Washington, 1935, p. 1.

It is at once clear that the Bureau of Land Management and the Coast and Geodetic Survey work in different dimensions: the former establishes the boundaries of the public land; the latter measures the depths of the ocean.

Indeed, the difficulties presented by these appeals are quickly resolved when it is realized that the phrase "line of mean high tide" as used by the Department of the Interior has a meaning quite different from that same phrase as used by the Coast and Geodetic Survey, just as the surveys executed by the Department of the Interior serve a different purpose from those executed by the Coast and Geodetic Survey.

It is well settled that the power to make and correct surveys of the public lands is reposed in the political department of the Government, and that the "land department" is charged with the duty of surveying the public domain, and must necessarily determine what are public lands subject to survey and disposal under the public land laws. *Kirwan v. Murphy*, 189 U.S. 35, 53 (1902). The Supreme Court has called this an elementary principle of our land law, "settled by such a mass of decisions of this court that its mere statement is sufficient." *Cragin v. Powell*, 128 U.S. 691, 699 (1888). The reason for this is that "great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do." *ibid.*

Within the "land department," or the Bureau of Land Management, as it is now called, it is the province of the Director to "consider and determine what are public lands, what have been surveyed,

what are to be surveyed, what have been disposed of, and what are reserved. * * *"[3]

The words "public lands of the United States" do not include all lands to which the United States may have legal title, or all lands that may be granted or disposed of by the United States, but are used to designate only such lands as are subject to sale and disposal under the general land laws. *Frank Burns,* 10 L.D. 365, 367 (1890). Upon its admission into the Union, the State of Alaska immediately acquired title to and jurisdiction over all lands within its limits below ordinary high water mark and such lands may not be disposed of by the Federal Government. Even before the admission of Alaska as a State, when the title to the tidelands was in the Federal Government, those tidelands were not subject to disposition under the general land laws; the title and dominion of the tide waters and the land under them were held by the United States for the benefit of the whole people, in trust for the future state. *Shively v.Bowlby,* 152 U.S. 1, 48 (1893). Hence, at the time the public land order was issued, and at the time the land here involved was surveyed, the tidelands of Alaska, although Government lands, were not "public lands." *Scrip Applications for Submerged Coastal Lands,* M-36084 (June 25, 1951); *Mann v. Tacoma Land Co.,* 153 U.S. 273 (1894).

Since tidelands are not public lands, they are, of course, excluded from the surveys of the public lands. The meander line, which is the traverse of the margin of a permanent body of water, marks the limit of the Government survey. *Northern Pacific Railway Company et al.,* 62 I.D. 401, 405 (1955).

The outermost extent of the public land surveys – the proper place for running the meander line–has often been designated as the "limits of high water," or the "ordinary high water mark." *Barney*

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[3] *Manual of Instructions for the Survey of the Public Lands of the United States,* Washington, 1947, p. 3.

v. Keokuk, 94 U.S. 324, 338 (1876); *Frank Burns, supra*, 369. But, in the history of the Department of the Interior, many other phrases have also been used to designate the proper place for running the line. These phrases are discussed in the case of *Nome Transportation Company*, 29 L.D. 447, 449 (1900) where, apparently for the first time, the phrase "line of mean high tide" came to the attention of the Department, in connection with an application, under section 6 of the Act of May 14, 1898 (30 Stat. 411) for a right of way "parallel to and eighty feet from the line of mean high tide" of Norton Sound, in Alaska.

The Secretary of the Interior requested an opinion as to whether or not the permit might issue; in his reply, the Assistant Attorney-General stated:

> "The statute authorized the issuance of a permit for a right of way only 'over the public domain.' Tide lands are not a party of the 'public domain' within the meaning of that term as used in the statute (*Shively v. Bowlby*, 152 U.S. 1-58; *In re* James W. Logan, 29 L.D. 395). The term 'line of mean high tide,' as used in the application and accompanying survey and plat, may be of uncertain meaning. It is not the term usually employed to denote the inner boundary of tide lands. 'Lands under tide waters,' or 'below high water mark of tide waters,' 'lands flowed by the tide,' and other expressions of like import, are usually employed in defining what are tide lands (*Shively v. Bowlby, supra*). If by the words, 'that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest,' or the 'line of mean high tide,' is meant 'high water mark,' or 'that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest,' or the line which is marked 'by the periodical flow of the tide, excluding the advance of waters above this mark by winds and storms and by freshets or floods,' or 'the line of

> ordinary high tide between the springs and neaps,' there is no uncertainty in the description or designation of the lateral lines of the right of way applied for. I am of the opinion that the words named were employed as the equivalent of the expressions quoted, but to avoid possible uncertainty in that respect it should be stated in any permit granted for this right of way that it is given upon the theory such words refer to that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest. If such words are otherwise employed in the application the proposed right of way may or may not embrace tide lands, depending upon the meaning intended."

In other words, the "line of mean high tide" was deemed to be an acceptable designation for the boundary of the public domain if the term is synonymous with "high water mark," or "line of ordinary high tide between the spring and neaps," or other similar terms traditionally used to designate the boundaries of the tide lands.[4]

"Line of mean high tide" was thus not regarded in 1900 as a new phrase for a new concept – the boundary of the public lands as determined by some modern method – but rather as a new, and alternative phrase for an old concept: the boundary of the public lands as determined by long established practice. The displacement of one phrase by another did not, and was not intended to, reflect a change in what was designated.

This may be further demonstrated by the way in which the Congress has used these terms.

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[4]In the Manual of Surveying Instructions then current, it was stated, "In the survey of lands bordering on *tide water*, 'meander corners' will be established at the points where surveyed lines intersect *high-water* mark, and the meanders will follow the *high-water line.*" *Manual of Surveying Instructions*, Washington, 1894, p. 58.

Section 2 of the Act of May 14, 1898, 30 Stat. 409, declared that:

> "nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District [i.e., Alaska], or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the *line of ordinary high tide* and all nontidal waters navigable in fact up to the *line of ordinary high water mark.*" (Emphasis supplied.)

In 1957, the Senate, in connection with a bill authorizing the grant of certain tidelands to the Territory of Alaska, considered the statute of 1898, and stated in a report accompanying the 1957 bill:

> "By the act of May 14, 1898 (30 Stat. 409, 48 U.S.C. sec. 411), the tidelands in Alaska, defined as those lands lying between the *line of mean high tide* and the line of mean low tide, were reserved for the future state, and consequently they can be disposed of only at the direction of Congress." 1957 U.S. Code Cong. and Adm. News, 1933 (Emphasis supplied).

Since the 1898 statute contains no reference to the phrase, "line of mean high tide," it is clear that the Senate, in its report, recognized the phrase "line of ordinary high tide" to be the equivalent of the phrase "line of mean high tide."

The 1957 bill itself, as enacted into law, is equally explicit on this point, and states that "* * * *'the line of mean high tide' shall mean the meander line as heretofore established by Government sur-*

vey, or, in the event that such a survey has not been made, the present line of mean high tide * * * ." Act of September 7, 1957, 71 Stat. 623, 48 U.S.C., 1952 ed., Supp. V, sec. 455a (Emphasis supplied). In view of the fact that the meander line has always been located with reference to "high water mark," or "limits of high water," or "line of ordinary high tide," it is clear that Congress' equation of the "line of mean high tide" with the meander line is, in reality, an equation of "line of mean high tide" with "high water mark" or "line of ordinary high tide."

In deciding where to run the meander line, it is, and has been, the practice of cadastral engineers to study markings on the soil resulting from the action of the water. Generally, a definite escarpment in the soil will be traceable, at the top of which is the true position for the engineer to run the meander line.[5] Also, the presence or absence of vegetation is noted as a guide to marking the boundary of the public domain. This is an especially significant factor because the ancient distinction between tideland and upland is that the upland is dry and maniorable, whereas the tidelands are, by definition, so regularly covered by the flow of water as to render them unfit for cultivation, the growth of grasses, or other use to which the upland is applied. *San Francisco v. LeRoy*, 138 U.S. 656, 671 (1891); *Knight v. United States Land Association, supra; Shively v. Bowlby, supra.* This was recognized by the Court of Appeals which, in its decision in the *Borax* case, described mean high tide as the "line defining the boundary between the tillable uplands and the lands which were ordinarily submerged by the tides." *City of Los Angeles v. Borax Consolidated Limited et al.*, 74 F.2d 901, 905 (1935).

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[5] *Manual of Instructions for the Survey of the Public Lands of the United States*, Washington, 1947, p. 231.

This method of running meander lines has long been adhered to. Where an agency entrusted with the duty to survey the public lands has conducted a survey in conformity with principles developed over a period of 160 years, the methods used by that agency will prevail, within the agency, over techniques used by other Government agencies in conducting surveys in no way connected with the public land laws of the United States.

It must accordingly be concluded that the phrase, "line of mean high tide" has been used by the Department, and has been recognized by Congress, to signify that line which would be meandered by the cadastral engineer in accordance with the practices developed when that same line was designated by terms such as "line of ordinary hight tide," "high water mark," "high water line," "that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest," and similar phrases. This is a meaning independent of and separate from any other meaning which may have accreted to the phrase.

The decision of the Supreme Court in the Borax case must, therefore, be limited in its application to the factual situation which gave rise to it; a dispute as to the exact boundary of very valuable lands no longer in the public domain. Although a meander line on an official plat of survey may be considered as delineating the seaward boundary of the public domain, a meander line is not as of course the boundary of land after it passes into private ownership. The actual water line, of which the meander line is, for the most part, only an approximation, is, no matter how much it may shift, the boundary, and a deed describing a lot by number or name conveys the land up to the shifting water line, exactly as it does up to a fixed line. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 196 (1890); *Harvey M. LaFollette et al.*, 26 L.D. 453, 469 (1898).

In the *Borax* case, the Supreme Court did not hold that the survey, or method of survey, of the public domain by the Land Department in 1880 was incorrect; rather it set forth what it considered to be the proper procedure for determining the boundary, in 1935, of land in private ownership. It would be gratuitous to assume that the Supreme Court, in that decision, intended to "overthrow the public surveys on no other ground than they could have the work in the field better done." Since 1935, when the Borax case was decided, as before, the usual method of determining the littoral boundary of public lands has been to deduce it from the physical effect of the water's action upon the land, rather than by measuring the depth of the high tide over a period of 18.6 years.[6]

The present appellants contend that "until such time as an accurate survey of the exact location of the line of mean high tide of Turnagain Arm reverses the decisions of the Mely and Lewis [sic] Oelschlaeger cases, clearly entrymen who establish their claims and completed their legal requirements with notice of, and in reliance upon, these earlier decisions, cannot be deprived of their rights by mere administrative fiat. To this extent it is submitted that the Government is estopped from denying the import of its own published decisions in the two precedent making cases."

But the answer to this, in the light of the foregoing discussion, is that the determination of the line of mean high tide, in the technical sense meant by the appellants, has no bearing upon the resolution of this case; although useful for certain purposes, it would not affect or establish the location of the boundary of the public lands.

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[6]At the time of the hearing in the *Mely* case, a map, prepared by Mr. Rivers, the registered engineer, at the request of Mr. Mely, was submitted; on this map, the line of mean high tide was depicted as being far out on the mud flats. Mr. Rivers' observations, however, did not extend over a period of 18.6 years, but only over a period of 14 days in June, 1953.

The phrase, "line of mean high tide" in a public land order, means only "boundary of the public land," or "meander line." Although a meander line does not delimit a private owner's holding (he owns to the water's edge), it does delimit what the land department has jurisdiction over, and may dispose of: the meander line is a means of ascertaining, in fractional portions of the public lands bordering on navigable waters, the quantity of land in the fraction subject to sale, which is to be paid for by the purchaser. *Railroad Company v. Schurmeir*, 74 U.S. 272, 286 (1868). The plat of survey is conclusive as to the acreage of land in legal subdivisions, and the land has to be sold on the basis of the acreage shown by the plat. *Scott v. Snively* (On Petition), 49 L.D. 583 (1923).

A withdrawal of lands for a specific use incompatible with their disposition under the public land laws is itself a disposition of lands; such lands become severed from the mass of public lands exactly as if they had been patented to an individual. Cf. *Loyal N. Massey, Leona Massey*, A-23861 (July 24, 1945). Just as the meander line on an official plat of survey is conclusive as to the area of land for which a charge may be made when the land is sold, so is it conclusive as to the area of land included in a withdrawal. And, in like manner, where the starting point for measuring the width of a withdrawal, or any other distance which must be ascertained in connection with the administration and disposal of the public lands, is the littoral boundary of the public domain (whether it be called "line of mean high tide," or "high water mark," or any other phrase), the plat of survey is conclusive as to the location of the littoral boundary, and the location of the point from which the measurement must be made.

It was the purpose of Public Land Order 576 to withdraw a strip of *public land* one mile wide along the shore of Turnagain Arm. After the date of the Mely decision, the land was surveyed, the seaward boundary of the public land established, and this boundary de-

picted as a meander line on the plat of survey. The plat of survey, when approved, became the official determination of the extent of the public lands, and it is binding on all agents of the Bureau. *Knight v. U.S. Land Association,* 142 U.S. 161, 177 (1891). This survey showed the lands applied for by Mr. Oelschlaeger and Mr. Pennington to be withdrawn. Their applications were therefore properly rejected. The factual situation of the *Mely* case, where the land was unsurveyed, and the limits of the withdrawal open to question, is not the factual situation of the instant cases, and the decision in the *Mely* case does not require a similar decision here.

Moreover, Mr. Pennington did not establish his claim with notice of, and in reliance upon, the decision in the Mely case, because the Mely case had not been decided at the time he filed his notice of location.[7] What, in the eyes of the law, both entryman did have notice of, at the time they attempted to initiate their claims, was the fact that the area was withdrawn: the publication of a document in the Federal Register operates as constructive notice of the contents of the document to any person subject thereto or affected thereby. 44 U.S.C., 1952 ed., sec. 307.

Since the appellants' proposed homesteads are within an area which was, before they initiated their claims, withdrawn from all forms of entry by Public Land Order 576, their notices of location, homestead applications, and offers of final proof must be rejected.

II

It is argued that Public Land Order 576 is invalid. The appellants contend that the land order cites as its authority Section 4 of

---

[7]Public Land Order 576 was published in the Federal Register on April 6, 1949; Mr. Pennington filed his notice of location on May 6, 1953; Mr. Oelschlaeger filed his notice of location on April 21, 1954; the decision favorable to Mr. Mely was promulgated on September 3, 1953, and patent was issued to him on April 27, 1955.

the Act of May 24, 1928 (49 U.S.C., 1952 ed., sec. 214) and Executive Order No. 9337 of April 24, 1943. The Act of 1928 authorizes the Secretary of the Interior to establish beacon lights and other air navigation facilities and therefore cannot, the appellants maintain, authorize the withdrawal of land for the relocation of a highway. However, Public Land Order 576 is quite extensive, and the Act of 1928 is the authority merely for one portion of the order – paragraph (2) – which does involve air navigation facilities.

The greater part of the order was issued under the authority of Executive Order 9337, which reads in part:

> "By virtue of the authority vested in me by the Act of June 25, 1910, Ch. 421, 36 Stat. 847, and as President of the United States, it is ordered as follows:
>
> "Section 1. The Secretary of the Interior is hereby authorized to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States to the same extent that such lands might be withdraw or reserved by the President, and also, to the same extent, to modify or revoke withdrawals or reservations of such lands * * *."

The appellants state that "Title 43 of the Code of Federal Regulations contains only two references to the statutory authority under which this Executive Order was isssued, one of which has to do with 43 U.S.C. 711 (withdrawl for townsite purposes) and the other with the Act of June 1, 1938, 52 Stat. 609, as amended (43 U.S.C. 682A) which is the Act pertaining to the lease or sale of small tracts. Neither of these statutes appear to be applicable."

However, in the Code of Federal Regulations, Executive Order 9337 is mentioned but briefly in connection with the townsite and small tract laws: land reserved pursuant to this Executive Order (which has since been superseded by Executive Order 10355 [17 F.R. 4831; 3 CFR, 1952 Supp.]) may be disposed of under the

townsite laws (43 CFR 255.1) but not under the small tract laws (43 CFR 257.1).

It is clear that Executive Order 9337 was not issued under the authority of the townsite or small tract statutes, but merely limits the lands to which one of those statutes may be applied. The authority to issue the Order is based upon inherent powers possessed by the President and delegated to the Secretary of the Interior. The withdrawal by the Secretary has the same effect, and validity, as a withdrawal by the President himself. Cf. *Wilbur v. United States,* 46 F.2d 217 (1930); *Authority of the Secretary of the Interior to Withdraw Public Lands*, M-36144 (August 4, 1952). The Secretary's power to make withdrawals, like the President's, is broad enough to include reservations for highway purposes.

The appellants further assert that if the authority for the withdrawal exists, the reason does not. Public Land Order 576 reserved the one mile strip "pending relocation of the Anchorage Seward Highway." The appellants state that the relocation was completed in 1947, 16 months before the order of withdrawal. The letter from the Alaska Bureau of Public Roads, submitted by the appellants to establish this fact, makes it clear that it was merely the *survey* which was completed in 1947; according to records in the Office of Territories, Department of the Interior, Washington, D.C., the actual construction of the highway was not completed until 1952, although work had advanced sufficiently for it to be opened to traffic in 1951. There is no reason to assume that the completion of the survey for the highway made the withdrawal unnecessary.

Nor can it be successfully argued that the language of the withdrawal, as originally published in the Federal Register, was too vague to permit anyone to establish its extent. Since the land was unsurveyed at the time of the withdrawl, it could be described only by mets and bounds. The most natural and convenient way to describe

a littoral tract is to state that it is bounded on one side by the ocean, and, of course, the words, "Turnagain Arm," or "the shore of Turnagain Arm" could have been used to describe the western boundary of the withdrawal. But this would not have obviated the difficulty which has arisen: by the common law, the shore of the sea, and, of course, of the arms of the sea, is the land between ordinary high and low water mark – the land over which the daily tides ebb and flow. When, therefore, the sea or bay is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails. *United States v. Tomas Pacheco et al.*, 69 U.S. 587 (1865). And as has been shown, "line of mean high tide," when used in connection with the public lands of the United States, is merely a synonym for "line or ordinary high water mark." Thus, the lan- used to describe the western boundary of the withdrawal was as precise as was possible in a metes and bounds description.

This method of describing unsurveyed withdrawn lands has for precedent Section 10 of the Act of May 14, 1898, *supra,* which provides that a "roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway * * *." "Shore line" was construed by the Department to mean "high water line." *Regulations Concerning Homesteads, Rights-of-Way, Timber, etc., in Alaska*, 27 L.D. 248, 264 (1898). There is no record of this description of the withdrawn area ever having been found to be so vague as to forbid the application of the statute.

Furthermore, in the instant cases, after the lands were surveyed, a legal description of the withdrawn area was published in the Federal Register. This did not deprive the appellants of their rights by mere administrative fiat; rather, it established with greater precision what had been clear before, that, within this certain area, no rights could be initiated.

Accordingly, there can be no doubt as to the authority for the withdrawal, the reason for it, or its effectiveness in giving notice that the land in question was withdrawn from settlement.

III

The appellants also contend that since their notices of location, applications for homestead entries, and final proof offers were accepted by the Land Office, they have equitable title to the land, and are entitled to receive legal title. This argument is without merit for the simple reason that the land being withdrawn was not available for homestead entry either on the date of the settlement on the land, or on the date the homestead applications were filed. No rights can be secured under the homestead laws to lands reserved by competent authority from settlement and entry until the lands are made available for entry.

The Manager, in this case, did not accept the appellants' applications and final proof in the sense that he approved them; the Manager merely received the applications, as he is required to do. When he finally acted upon the notices of location, applications, and final proof, he rejected them, because the land was withdrawn from homestead entry. Even if an official of the Bureau of Land Management had purported to authorize the appellants to enter the land prior to its restoration to entry, such authorization would have conferred no rights on the appellants. *Arthur Halsted*, A-27298 (Mah 21, 1956).

Since the appellants' proposed homesteads are within a withdrawn area, and since their settlements on the land were made subsequent to the withdrawal, their claims are, on their face, as a matter of law, invalid, and there is no requirement that a hearing be held in this matter. *Clear Gravel Enterprises, Inc.*, 64 I.D. 210 (1957).

This result is not changed by the fact that some of the land withdrawn by Public Land Order 576 has been restored to entry by Public

Land Order 576 has been restored to entry by Public Land Order 1654 (23 F.R. 4411, June 19, 1958). It is well settled that no rights are acquired by an application to enter land if the land sought is withdrawn from entry at the time the application is filed, and it is equally well settled that no rights accrue to an applicant if, pending an appeal by him from the rejection of his application for such a reason, the land is restored to entry. *Roy Leonard Wilbur, Robert Montgomery Tubb*, 61 I.D. 157 (1953).

The decisions of the Manager rejecting the appellants' notices of location, applications to enter, and final proof, are therefore affirmed. This action is without prejudice to the right of the appellants to submit new applications for the same land, if the land is now open to entry. The appellants will not be entitled to a preference right to enter by virtue of their settlement on the land at a time when it was withdrawn from entry.

Mr. Pennington and Mr. Oelschlaeger are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

/s/ Edward Woozley
Director

Enclosure

DISTRIBUTION

Mr. Robert O. Pennington (Regular Mail)
Mr. Richard L. Oelschlaeger (Regular Mail)
Mr. Edgard Paul Boyko, Attorney (Certified Mail)
Mr. S. J. Buckalew, Jr., Attorney (Certified Mail)
Hon. E. L. Bartlett, U.S. Senate, Washington 25, D.C.
Lands Staff Officer
Appeals List No. 1
Cadastral Engineering Staff Officer (2)
MG

[Filed January 17, 1967]

PLAINTIFF'S EXHIBIT G

75078-60

RICHARD L. OELSCHLAEGER

A-28299 Decided June 27, 1960

Surveys of Public Lands: Generally – Boundaries

Where an order withdrawing a tract of unsyrveyed land from entry gives the line of mean high tide of a branch of an inlet as one of the boundaries of the withdrawn area, the meander line which is run in surveying the area in accordance with the mean high water line is to be regarded as the equivalent of the line of mean high tide in establishing the littoral boundary of the withdrawn area.

Homesteads (Ordinary): Lands Subject To

Land which is withdrawn from entry under the public land laws is not subject to settlement or to the initiation of any claim under the homestead laws even though other land in the same withdrawal may have erroneously been patented under the homestead law.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D.C.

A-28299

Richard L. Oelschlaeger : Anchorage 026482.
: Settlement location
: notice rejected; ap-
: plication for homestead
: entry and final proof
: rejected.
: Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Richard L. Oelschlaeger has appealed to the Secretary of the Interior from a decision of October 23, 1959, by the Director of the Bureau of Land Management[1] affirming a decision by the manager of the Anchorage land office rejecting the appellant's settlement location notice, his application for homestead entry, and his final proof papers on 100 acres of land in secs. 3 and 10, T. 11 N., R. 3 W., S. M., Alaska.[2] The plat of survey of this land was accepted on October 28, and filed on December 22, 1954, but when the appellant filed his settlement location notice on April 21, 1954, an official plat of survey had not yet been filed and the land was therefore classified as unsurveyed.

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[1] The Director's decision also involved an entry by one other person who did not appeal to the Secretary.

[2] A settler on Alaskan land is required by statute to file, in the district land office where the land is situated, notice of settlement within 90 days after settlement (48 U. S. C., 1958 ed., sec. 371 *et seq.;* 43 CFR 64.3).

By decision of November 19, 1956, the manager rejected the appellant's settlement location notice, his homestead entry application filed on January 31, 1955, and final proof papers filed on April 20 and june 14, 1955, for the reason that when the appellant initiated settlement on the land, it was withdrawn from entry under the public land laws in accordance with Public Land Order 576 of March 29, 1949 (43 CFR, 1953 Supp., p. 258; 14 F. R. 1614). Public Land Order 576, in part here material, withdrew from all forms of appropriations under the public land laws and reserved, under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward highway, the "public lands" within the following described area:

> "Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S. M., thence by metes and bounds,
>
> "Southeasterly, 10 miles parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;
>
> "South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;
>
> "Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.
>
> "East, 1¼ miles along south boundary of secs. 32 and 33 to point of beginning."

The tract of public land, ten miles in length, withdrawn by this order is bounded on the west by the "line of mean high tide" of Turnagain Arm, a cove branching off Cook Inlet, and the eastern boundary of the withdrawn area is a line one mile inland from and parallel to the mean high tide line of Turnagain Arm. Between the upland and the line of low tide of Turnagain Arm, broad level mud flats extend for a distance estimated at from 3 to 5 miles, and these flats, covered and uncovered by the flow and ebb of the tide, are tidelands. As tidelands

are not public lands, they are excluded from the area withdrawn by P. L. O. 576 (*Shively v. Bowlby*, 152 U.S. 1 (1894), *Mann v. Tacoma Land Company*, 153 U.S. 273 (1894)).

The exact boundaries of the withdrawn area could not be determined and adjusted to the lines of legal subdivisions until after the land was surveyed (see Instructions, "Survey of Lands Withdrawn While Unsurveyed", 42 L. D. 318 (1913)). In a memorandum of November 8, 1954, from the Director to the Area Administrator, Area 4, Anchorage, with respect to the adjustment of P. L. O. 576 (and of another reserve not here relevant) to the lines of legal subdivision in T. 11 N., R. 3 W., S. M., Alaska, as shown by plats of the survey of this township accepted on October 28, 1954, the public land in the above-quoted portion of P. L. O. 576 was described by legal subdivisions. The manager's rejection of the appellant's homestead claim was based upon the memorandum of November 8, 1954, which indicated that the land for which the appellant applied was withdrawn by P. L. O. 576.

On this appeal it is contended, in effect, that the location of the western boundary of the land withdrawn by P. L. O. 576 was improperly determined and, as a consequence, the entire area withdrawn by the order is incorrectly described in the Director's memorandum of November 8, 1954. In support of this contention it is argued that the plat of survey of the area upon which the memorandum of November 8, 1954, is based does not indicate the line of mean high tide of Turnagain Arm, but only the meander line along Turnagain Arm and that the determination of the boundaries of the withdrawn area improperly used the meander line rather than the line of mean high tide as required by the order in establishing the western boundary of the withdrawn area.

The Director's decision discussed in detail the reasons for concluding that the phrase "line of mean high tide" in P. L. O. 576 is

used in the same way and as the equivalent of the phrase "ordinary high tide", "high water mark", "high water line" and similar phrases which, in public land orders, signify that line which is meandered by the cadastral engineers in accordance with practices developed in the survey of areas bordering water and in establishing boundary lines of unsurveyed areas over a long period of time. In running the meander line it has been the practice of the cadastral engineers to find the mean high water elevation by evidence of the water's action on the soil.[3] The Director's decision held that the meander line is equivalent to the line of mean high tide for determining the extent and the boundaries of the withdrawal. This ruling in the Director's decision is amply supoorted by examples of a amply supported by examples tion of comparable phrases in land descriptions used boty by Congress and by this Department over a period of many years, and nothing on this appeal provides any basis for modifying the ruling.

The principal argument in support of this appeal is that two entries have been patented under the homestead laws on lands portions of which were withdrawn by P. L. O. 576 as described in the Director's memorandum of November 8, 1954. These two entries were initiated by settlement on the land shortly after the withdrawl order was issued and approximately 5 years before the plat of survey was accepted and filed. The entries referred to are Anchorage 015927

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[3]Manual of Instructions for the Survey of the Public Lands of the United States (Washington, 1947), pp. 231-232.

On appeal it is argued, *inter alia*, that the use of the phrase "mean high tide line" requires that the line be determined by proper scientific measurements although there is no indication of what constitutes such measurements. The Director's decision mentions a number of reasons why the Bureau, in interpreting the phrase "mean high tide line", is not bound by one of the methods formerly used by the Coast and Geodetic Survey and approved by the Supreme Court in *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 26-27 (1935). This method consisted in finding the average height of all the high waters at a given place over an average period of 18.6 years.

by Thomas N. Mely, whose settlement dated from May 7, 1949, and whose entry was patented on April 27, 1955, and Anchorage 018722 by Louis Oelschlaeger, father of the appellant, who settled on August 4, 1949, on land for which he received homestead patent on October 10, 1955. Since these two entries in large part appear to be within the area withdrawn by P. L. O. 576 from entry under the public land laws, and were initiated after the withdrawal order was issued, the appellant contends that the United States is estopped from rejecting the appellant's applications.

The contention is without merit. The Director's decision pointed out that the Mely entry was allowed as a result of a decision of September 3, 1953, by the acting manager which ante-dated the acceptance and filing of the plat of survey and which concluded that Mely's entry was made on land subject to homestead settlement. In the decision of September 3, 1953, after a hearing involving the validity of the Mely entry, the acting manager stated as a finding of fact that:

> "* * * the evidence shows that the Thomas N. Mely homestead, as described in his petition filed under Anchorage Serial No. 015927, does not lie, either in whole or in part, within a distance of one mile from the line of mean high tide of Turnagain Arm, and hence is not in conflict with P. L. O. 576 * * *".

This finding may have represented the opinion of the acting manager as to where the line of mean high tide, and consequently the inland boundary of the withdrawn land, lay but it could not bind or affect the Director of the Bureau in his determination of November 8, 1954, describing by legal subdivisions, the land so withdrawn since the approved plant of survey is the official and binding determination thereof (*Knight v. U.S. Land Association*, 142 U.S. 161, 176 (1891)). The Director's determination of November 8, 1954, indicated that the acting manager's determination of November 8, 1954, indicated that the acting manager's decision

of September 3, 1953, was erroneous insofar as it concluded that Mely's entry did not include lands withdrawn from entry under the public land laws. Likewise, the records on this appeal indicate that the allowance and patenting of the Louis Oelschlaeger entry, a portion of which is within the withdrawn area as described on November 8, 1954, appears to have been plainly erroneous to the extent that the entry covers land withdrawn under P. L. O. 576.

The allowance and patenting of a substantial portion of the two entries just referred to, while improper, could create no rights in the appellant to the land on which he attempted to settle at a time when it was not open to settlement. Land which is withdrawn from entry under the public land laws is not subject to settlement or to the initiation of any claims under the homestead laws (*Catherine Blankenburg,* A-25947 (December 8, 1950); Rafael D. Tobar, A-27008 (December 13, 1954); *Anne V. Hestnes,* A-27096 (June 27, 1955); *Lewis Sanford Cass*, A-27742 (January 14, 1959)). As the record in this case indicates clearly that the land for which the appellant seeks homestead patent was withdrawn from entry when he attepted to settle there, the rejection of his settlement location notice, his application for homestead entry, and his final proof papers was correct.

The request on behalf of the appellant for a hearing on a number of matters relating to the propriety of P. L. O. 576 is denied. The assertions on appeal do not raise issues of fact which require a hearing for determination (see *Lewis Sanford Cass, supra*). Furthermore the Department has held that even where a withdrawal is erroneously made to include land not intended to be embraced therein, it is nevertheless effective as to such land, and unless and until the land is released from withdrawal no rights inconsistent therewith will be recognized as attaching to any of the land actually withdrawn (*Ira J. Newton,* 36 L. D. 271 (1908)).

For the reasons mentioned herein and in the Director's decision, the rejection of the appellant's settlement location notice, his application for homestead entry, and final proof papers was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

GEORGE W. ABBOTT
The Solicitor

By: /s/ Edmund T. Fritz
Deputy Solicitor

[Filed April 4, 1967]

ORDER

The above cause having been argued before the Court on the 14th day of February, 1967, on Motion for Summary Judgment filed by Plaintiff, and Cross-motion for Summary Judgment filed by Defendant, it is by the Court this 4th day of April, 1967,

ADJUDGED, ORDERED and DECREED:

(1) Plaintiff's Motion for Summary Judgment is denied; and

(2) Defendant's Cross-motion for Summary Judgment is denied; and

(3) The cause is remanded to the Department of the Interior with instructions that a determination of the line of mean high tide be made in accordance with the method stated in *Borax, Ltd., v. Los Angeles,* 296 U.S. 10; and

(4) For a further determination of the extent of the withdrawn area as it may be applicable to the lands embraced in Plaintiff's home-

stead entry, by measuring the said withdrawn area from the line of mean high tide as determined above; and

(5) For an administrative adjudication of Plaintiff's homestead entry in accordance with the above determinations.

/s/ Burnita Shelton Matthews
Judge

[Filed June 1, 1967]

NOTICE OF APPEAL

Notice is hereby given this first day of June, 1967, that Stewart L. Udall, Secretary of the Interior, and Karl E. Landstrom, Director, Bureau of Land Management, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the fourth day of April, 1967 in favor of Richard L. Oelschlaeger against said STEWART L. UDALL and Karl E. Landstrom.

/s/ Martin Green
Attorney for Defendants

James W. McDade, Esquire
Attorney for Plaintiff

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T 12 N

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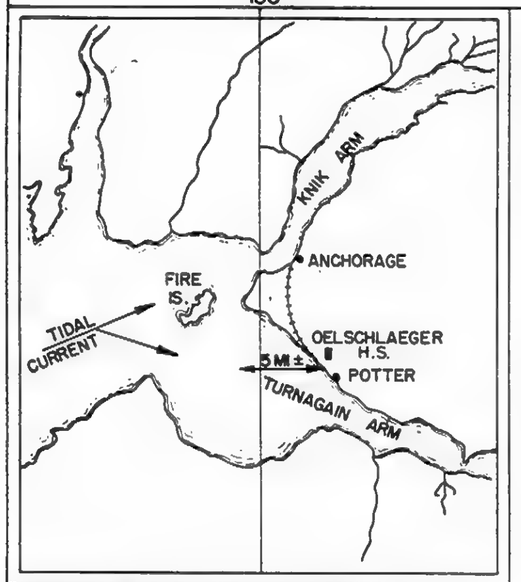

VICINITY MAP
REF. U.S.C. & G.S.

CORRECTION FOR CONVERGENCE ON TOWNSHIP LINE NOT AVAILABLE

N

4

3

2

T. M. MELY 015927 PTD. 4-27-55

L. OELSCHLAEGER 018722 PTD. 10-10-55

PLAINTIFF 026482 APPL'D 4-27-54

R. O. PENNINGTON 024014 APPL'D 5-6-53

1 MILE FROM M.H.T.

9

10

11

ALASKA RR.

SCALED LOCATION OF USLO. BOUNDARIES AND MEANDER LINE SKETCH MAP IN ANCHORAGE LAND OFFICE; OFFICIAL PLAT NOT AVAILABLE (APPROXIMATE ONLY).

TIDE FLATS
AVER. FALL 0.25' PER 100.00

1580'

770'

POTTER

MHT. REF. FIRE ISLAND. STA. ESTABLISHED FROM TIDAL OBSERVATIONS JUNE 1953

Plaintiff's Exhibit A

Filed
Jan 17, 1967
Robert M. Stavers, Clerk

SKETCH MAP

R. OELSCHLAEGER HOMESTEAD CLAIM
ANCHORAGE 026482
SCALE: 6"– 1 MILE

60

DUPLICATE ORIGINAL

TOWNSHIP 11 NORTH, RANGE 3 WEST OF THE SEWARD MERIDIAN, ALASKA

N

MAGNETIC DECLINATION 30°00'E

North boundary surveyed by V. H. Wilhelm in 1916 and Lloyd S. Toland in 1950.

Surveys shown on this plat were executed by Lloyd S. Toland and Hobart B. Hyatt, Cadastral Engineers, May 8, 1950 to October 14, 1953, under Special Instructions for Group 78, Alaska, dated May 1, 1950.

For bearing and distances along the Seward-Anchorage Highway right-of-way lines, see field notes.

Defendant's Exhibit 1
Filed
Jan. 17, 1967
Robert M. Stearns, Clerk

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D. C. October 28, 1954

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Acting Cadastral Engineering Officer

SCALE IN CHAINS

Sec. 5
13.10

Sec. 4
502.64

Sec. 3
640.00

Sec. 9
7277

Sec. 10
600.05

Sec. 2
640.00

Sec. 1
640.00

T. 11 N.
R. 3 W.

PATENTED
OELSCHLAEGER
018722

OELSCHLAEGER
026482

SEE BELOW LEFT FOR SECTIONS 1 & 2

TURNAGAIN ARM

ANCHORAGE

Area: 3108.56 Acres

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21127

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL., Appellants

v.

RICHARD L. OELSCHLAEGER, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
JOHN G. GILL, JR.,
Attorneys, Department of Justice,
Washington, D. C., 20530.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior was arbitrary, capricious and unreasonable in defining what land was withdrawn from entry by Public Land Order 576 concerning a strip for highway purposes.

2. Whether Borax, Ltd. v. Los Angeles controls the interpretation of the phrase "line of mean high tide" as used in Public Land Order 576.

3. Whether the Department of the Interior is estopped from refusing to issue a homestead patent upon land withdrawn from the public domain by virtue of its previously having erroneously issued patents for two adjoining homestead applications within the same withdrawal.

I N D E X

CITATIONS

Cases: Page

*/ Those cases chiefly relied upon are designated by an asterisk.

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OPINION BELOW

The district court did not write an opinion; however, by order it remanded the case to the Department of the Interior with instructions (JA 56).

JURISDICTION

This is a suit against the Secretary of the Interior and the Director of the Bureau of Land Management to obtain relief in the nature of mandamus seeking an order directing them to issue a final certificate and patent to appellee's homestead application or alternatively to grant appellee an administrative hearing. Subject matter jurisdiction was

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asserted under 43 U.S.C. secs. 161-163 and 48 U.S.C. secs. 371-378. The jurisdiction of the court was invoked under 28 U.S.C. sec. 1331 and 5 U.S.C. sec. 1009 (JA 3).

Judgment overruling both parties' cross-motions for summary judgment and remanding the case to the Interior Department with instructions was entered April 4, 1967 (JA 56).[1/] Appellants dispute the jurisdiction of the court to grant the relief contained in its order. Timely notice of appeal was filed June 1, 1967 (JA 57). This Court has jurisdiction under 28 U.S.C. sec. 1291.

STATEMENT OF THE CASE

On April 6, 1949, the Secretary of the Interior issued Public Land Order 576 which, in part, withdrew from all forms of appropriation under the public land laws a strip of land 11 miles in length "parallel to and one mile distant from the line of mean high tide of Turnagain Arm" in Alaska pending relocation of a highway.[2/] In 1954, appellee,

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1/ There can be no question whether this is an appealable order. The district court has no further function in the lawsuit. It has ordered a final adjudication of the homestead application pursuant to the court-declared description of the land withdrawn.

2/ 14 Fed. Reg. 1614.

Richard L. Oelschlaeger, settled on certain land along Turnagain Arm and attempted to initiate a claim to it under the homestead laws. Subsequent to appellee's initial entry, the official survey of this area was filed, December 22, 1954. Appellee filed his final proof of entry April 20 and June 14, 1955. His application for final homestead patent was rejected November 19, 1956, by the Manager of the Land Office in Anchorage, on the ground that the land sought was withdrawn in 1949, by P.L.O. 576, and was thus not open to entry (JA 24). In his written opinion (JA 25), the Land Office Manager noted that appellee had never been notified that the land was open to settlement or entry and that he had been verbally advised of possible conflict with the withdrawal order. This decision was affirmed by the Director of the Bureau of Land Management on October 23, 1959, who ruled that P.L.O. 576 withdrew a strip of land measured from a surveyor's meander line (JA 26). The Solicitor of the Department of the Interior, in turn, affirmed this decision on the same basis June 27, 1960 (JA 49). In both administrative appeals, appellee vigorously contended that the waterward boundary of the withdrawn area was not that line meandered by surveyors along the edge of vegetation and

escarpment as Interior had ruled [3] but, instead, he argued that the phrase "line of mean high tide" in the order should be construed as meaning the precise average of all the high tides as determined by the United States Coast and Geodetic Survey, which method was relied on by the Supreme Court in settling a boundary dispute in Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935). [4]

Although the United States Coast and Geodetic Survey has not determined this line representing the mean high elevation of the tides in this part of Turnagain Arm, it appears that some, if not all, of appellee's homestead entry

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3/ The meander line is a series of straight lines run by a surveyor along the physical evidence of the high tide, the escarpment and edge of vegetation, wherever the public lands meet a navigable body of water. See II Shalowitz, Shore and Sea Boundaries (1964) pp. 450-451; U.S. Department of Interior, Manual of Surveying Instructions (1947) pp. 230-236; Railroad Co. v. Schurmeir, 74 U.S. 272, 286-287 (1868); 13 C.J.S., Public Lands, sec. 32b, pp. 682-683.

4/ Throughout this brief, the phrase "Borax line" will be used as a convenience; when used, the phrase means a line at the elevation of "the true average of all the high tides over a complete lunar cycle (18.6 years) as determined by U.S. Coast and Geodetic Survey." This was the definition given to "line of mean high tide" in Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935).

might lie more than one mile from this line.[5/] In this particular instance, unlike the situation of most rivers, lakes and oceans, the variance between the meander line and the Borax line is great because of low-lying, level mud flats along Turnagain Arm and the extreme rise and fall of the tide in Alaska. A slight increase in the level of high tide inundates several hundred acres.[6/] Thus, the question of what line was intended by the 1949 withdrawal order is crucial to appellee's case.

Appellee commenced this action seeking judicial review in the district court, December 29, 1960.[7/] The case

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5/ As the judge's order indicates, the relation of the land sought to the Borax line is not known. Without conceding that there will not be a conflict once the Borax line is established, the arguments in this brief assume appellee's contentions, that all of the homestead lands lie more than a mile landward of the Borax line, to be correct.

6/ This is due to the combined effect of the very level mud flats, the great rise and fall of the tide and the fact that there are two high tides on the West Coast (lower high and higher high). The difference between mean high and mean low tide in Cook Inlet (of which Turnagain Arm is an extension) is about 30.3 feet. U.S. Coast and Geodetic Tide Tables, "West Coast of North and South America" (1967 and 1968 ed.), pp. 183-185. U.S. Coast and Geodetic Survey Chart 8553 shows a distance of approximately four miles between high and mean lower low tide. Thus, a one-inch rise covers roughly 58 feet laterally of mud flats.

7/ The suit was not actively prosecuted by plaintiff's attorneys between 1960 and 1967 and was dismissed on that basis in 1963, but reinstated the next year.

came to trial on February 14, 1967, and Judge Matthews remanded to the Department of the Interior with instructions that a determination of line of mean high tide be made in accordance with the method stated in Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935); that it further be determined whether an area thus withdrawn is applicable to appellee's homestead entry; and, then, that a final adjudication of appellee's homestead entry be made in accordance with these directions (JA 56). Thereupon, this appeal was taken.

REGULATION INVOLVED

Public Land Order 576 of April 6, 1949, 14 Fed. Reg. 1614, reads in pertinent part as follows:

> By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, 3 C.F.R. 1943 Cum. Supp., and section 4 of the Act of May 24, 1928, 45 Stat. 729 (49 U.S.C. 214), it is ordered as follows:
>
> * * * * *
>
> Subject to valid existing rights and withdrawals, the public lands within the following described areas are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and reserved as follows:
>
> * * * * *

(5) Under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward Highway:

> Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S.M., thence by metes and bounds,
>
> Southeasterly, 10 miles, parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;
>
> South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;
>
> Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.,
>
> East, 1¼ miles along south boundary of secs. 32 and 33 to point of beginning.
>
> The area described contains approximately 6,700 acres.

STATEMENT OF POINTS

1. The district court erred upon judicial review by substituting its judgment for the reasonable judgment used by the Secretary of the Interior in construing his own Public Land Order.

2. The district court erred by construing P.L.O. 576 in a manner that contradicts specific language found on the face of the order and conflicts with the physical facts.

3. The district court erred in promulgating an order that both subverted the express intent of P.L.O. 576 and could not be implemented by cadastral engineers.

4. The district court erred in construing the words "line of mean high tide" as a term of art, where it was presented with the question whether the Secretary of the Interior was arbitrary, capricious and unreasonable in determining the precise location of the land withdrawn by P.L.O. 576.

5. The district court erred in relying upon Borax, Ltd. v. Los Angeles, which is factually inapposite to the case at hand.

6. The district court erred, if it based its decision upon appellee's argument that the Government was estopped by the previous erroneous issuance of neighboring homestead patents.

SUMMARY OF ARGUMENT

I

An extremely narrow question is presented to the court by this case involving the Secretary of the Interior's construction of his own Public Land Order. The court must

give great deference to an administrative agency's construction of its own regulation. Particularly in a case like this, where the only judicial review is in the nature of mandamus, the Secretary's determination could only be upset on the basis that he was arbitrary, capricious and unreasonable.

Here the Secretary's interpretation that the order called for a line meandered along the escarpment and edge of vegetation was reasonable for the following reasons: (1) The order on its face used a "meander corner" as one of the termini of the line; (2) the distances from fixed points in the order coincide with the meander line and are at a variance with the line in the district court's order; (3) a reserve of dry, fast upland measured from the meander line is more reasonably suited to the relocation of a highway than the overflowed, boggy mud flats that probably make up the withdrawal under the district court's order; (4) because of the irregularity of the Borax line on a horizontal plane, cadastral engineers could not locate the inland parallel line called for by P.L.O. 576 nor could they affix permanent monuments, whereas such could be done using the meander line; (5) the phrase "line of mean high tide " would reasonably be interpreted by a cadastral engineer as referring to the surveyor's meander line.

II

Borax, Ltd. v. Los Angeles only resolved a question as to the extent of rights between upland and tideland patentees and is entirely inapposite to the case at hand, where only the precise location of land withdrawn from the public domain by an ambiguous land order is at issue. Furthermore, the line defined in the Borax case is constant only in terms of elevation; on a horizontal plane (the one on which the reserve is described) this line bisects the shore at a line as sinuous as the edge of the tides and subject to the vagaries of erosion and accretion. Thus, the court's erroneous reliance on Borax led to an impractical result.

III

Finally appellee's argument below, that the government is estopped by virtue of the erroneous issuance of prior patents in this area, is without merit and could not properly have been relied upon by the district judge in making her order.

ARGUMENT

I

THE CONSTRUCTION OF P.L.O. 576 BY THE SECRETARY OF THE INTERIOR WAS REASONABLE AND THUS COULD NOT BE OVERTURNED BY THE DISTRICT COURT

A. The district court could only upset the Secretary's decision if it was arbitrary, capricious and unreasonable. -

This is a suit in the nature of mandamus seeking judicial review of the Secretary of the Interior's administrative determination not to grant a homestead patent to the appellee. At best, an extremely narrow question is presented. The district court is not called upon to make a de novo decision and its function is complete when it finds any reasonable basis for the conclusion reached by the executive department. Duesing v. Udall, 121 U.S. App. D.C. 370, 374, 350 F.2d 748, 752, cert. den., 383 U.S. 912 (1965); Pancoastal Petroleum, Ltd. v. Udall, 121 U.S. App. D.C. 193, 195, 348 F.2d 805, 807 (1965); Rochester Telephone Corp. v. United States, 307 U.S. 125, 146 (1939); cf. Atlantic Refining Co. v. F.T.C., 381 U.S. 357 (1965). Thus, in the situation presented by this case the district court could only have ruled as it did, if it found the Secretary's decision to withhold the homestead patents was arbitrary, capricious and unreasonable. Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966); Hayes v. Seaton, 106 U.S. App. D.C. 126, 128, 270 F.2d 319, 321 (1959), cert. den., 364 U.S. 814. As we shall show, the Secretary's construction of P.L.O. 576, which the judge's order indicates was the crucial question of the lawsuit, was not only a reasonable construction, it was the only reasonable construction.

In addition, since it was the interpretation of the Secretary's own Public Land Order that was at issue below, an even narrower question was presented to the court. Speaking of the interpretation of another public land order in this part of Alaska, the Supreme Court said in Udall v. Tallman, 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" Power Reactor Co. v. Electricians, 367 U.S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.
>
> "Since this involves in interpretation of an administrative regulation a court must necessarily look

> to the administrative construction of the regulation if the meaning of the words used is in doubt . . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."
>
> Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414 * * *.

In Duesing v. Udall, supra, this Court relied heavily on Udall v. Tallman in upholding the action of the Secretary of the Interior. Also see Robertson v. Udall, 212 U.S. App. D.C. 218, 219, 349 F.2d 195, 198 (1965), where this Court said:

> Our duty to defer to the Secretary's interpretation of his own regulations, so long as that interpretation is not plainly beyond the bounds of reason or authority, is well-defined. [Citing cases.] We observe it now.

Furthermore, in this regard it is hard to think of many matters that are more totally dedicated and committed to an agency's expertise than the location and identification of the public domain. Kirwin v. Murphy, 189 U.S. 35, 53 (1903); Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903). See also Sawyer v. Gray, 205 Fed. 160, 163 (W.D. Wash. 1913). ("The Government survey creates, not merely identifies, sections of land.") Cf. Decatur v. Paulding, 14 Pet. 497, 515 (1940).

It is in the above context, then, that the question in this case came to the district court. We submit that the court far exceeded its limited powers upon judicial review by way of mandamus and, in issuing its order, substituted its own judgment for the reasonable judgment of the Interior Department.

B. The Secretary's determination that P.L.O. 576 withdrew a strip of land measured inland from a surveyor's meander line was reasonable. - It is important to note that when P.L.O. 576 was issued in 1949 the area withdrawn had not been surveyed.[8/] Thus, the order was drawn in generalities and, of necessity, any property interests in this vicinity would only be accurately identified upon completion of the future Bureau of Land Management survey. This situation is responsible for the problem in this case. Both the land withdrawal and appellee's homestead entry took place prior to survey. Upon completion of the survey, when both of these areas could be pinpointed on an official plat, a conflict was revealed. Appellee's request for patent was, accordingly, denied. A number of factors combine to show that Interior's construction of the Land Order is the proper one, and that the district court erred in overturning it.

8/ The area immediately north of the withdrawal had been previously surveyed. The fixed points in the order refer to this area.

1. On its face, P.L.O. 576 calls for the meander line as the seaward base of the area withdrawn. - The aspect of the order which most obviously supports the Secretary's construction is the fact that the term "meander corner" appears in the order as one of the definite points used in locating the reserve. The fourth paragraph of the description reads:

> Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of section 32, T. 12 N., R. 3 W. (Emphasis added.)

A meander corner is that point where a township or section line intersects a meanderable body of water. Veatch & Humphreys, Water Terminology, p. 195; U.S. Department of Interior, Manual of Surveying Instructions (1947), p. 232, sec. 228. It is the point from which an engineer commences to run the meander line.[9/] This use of the meander corner of the surveyed section to the north clearly indicates that it was the intent of the draftsmen of the order that the line referred to would be meandered in the then unsurveyed area in accordance with the same methods which had been used

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9/ U.S. Department of Interior, Manual of Surveying Instructions, supra, p. 233, sec. 230.

by the Department of the Interior in the previously surveyed area to the north. A meander corner is, by definition, a point on the meander line. The Borax line would lie well seaward of any meander corner on Turnagain Arm. Thus, to apply the Borax line here is to violate the specific language of the order, which finds the "line of mean high tide" coinciding with the meander corner of section 32.

This argument is buttressed when the metes and bounds distances contained in the order are measured on the U.S. Geological Survey Map of Anchorage and Vicinity (1962) 10/ (see illustration infra, p. 19), which adopts the "approximate line of mean high water" as determined by U.S. Coast and

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10/ This map is illustrative of these distances. It is subject to judicial notice by this Court. Pfeifer Oil Transp. Co. v. The Ira S. Bushey, 129 F.2d 606, 607 (C.A. 2, 1942); Krench v. United States, 42 F.2d 354, 355 (C.A. 6, 1930); United States v. Romaine, 255 Fed. 253 (C.A. 9, 1919). Copies have been lodged with the Clerk, for the convenience of the Court, and provided to opposing counsel.

Geodetic Survey. 11/ The one fixed point in the order, other than the meander corner, is the southeast corner of section 33 of Township 12 North, Range 3 West, Seward Meridian, which is both the starting point and the end of the description. The order calls for a line running from this point one mile distant and parallel to the line of mean high tide. When measurements are taken on the above-mentioned map, this point is located exactly one mile inland from the line of vegetation, while at its closest point U.S. Coast and Geodetic's "approximate line of mean high water" [the estimated Borax line] lies 1.2 miles seaward of the southeast corner of section 33.

11/ The record does not indicate that the Borax line has been established in this area of Turnagain Arm. U.S. Coast and Geodetic Survey has informed us that such a line will not be established before 1969. This is supported by appellee's Exhibit A (JA 59), which indicates the area's tidal elevation station, Fire Island, as having been established in 1953. To date, the necessary time period of 18.6 years has not elapsed so that the Borax line can accurately be determined.

U.S. Coast and Geodetic Survey has, however, computed a rough approximation of the Borax line which it refers to as the "approximate line of mean high water." In making the map referred to above, U.S. Geological Survey has adopted this "approximate line of mean high water" as shown on U.S. Coast and Geodetic Survey's preliminary survey sheet BO, Charts 8553 (1963) and 8557 (1961). For purposes here, this approximate line is illustrative of the probable variance of the Borax line with the distances in the order.

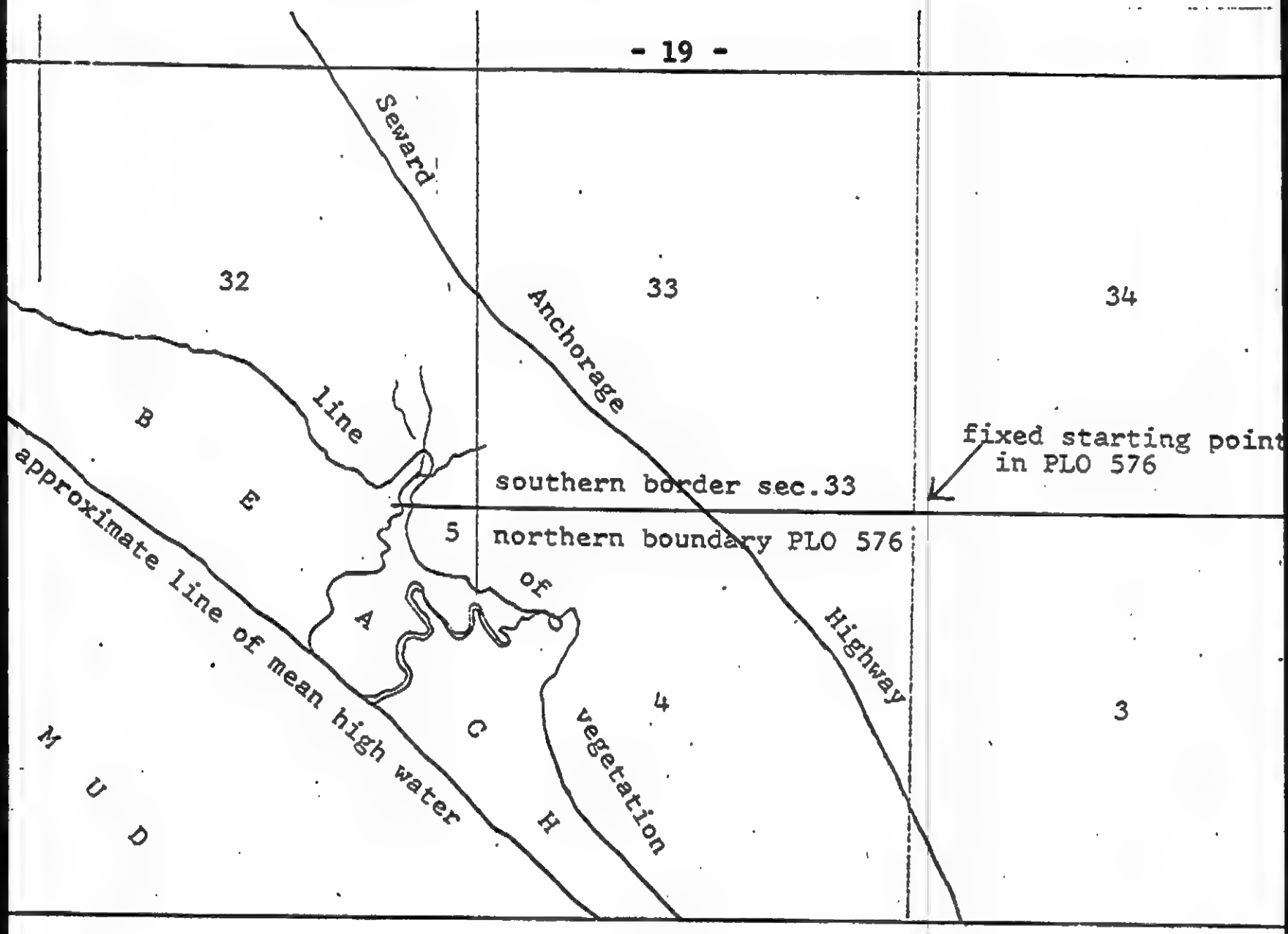
In fact, if appellee's contentions below regarding the location of the Borax line are correct, there will be a greater variance when the true Borax line is located.

The only other distance mentioned in the order is in the closing paragraph:

> East, 1¼ miles along south boundary of secs. 32 & 33 to point of beginning.

As stated, the southeast corner of section 33 (the point of beginning) is the fixed point. By measuring west instead of ease (i.e., backwards), one can determine what line was intended by the order. Here again the Anchorage and Vicinity Map illustrates that the line of vegetation conforms more closely to the wording of the order lying 1-1/5 miles 12/ due west of the southeast corner of section 33, while the "approximate line of mean high water" falls 1-3/4 miles due west of this point. In light of these distances, we submit no ambibuity remains as to what line was intended by the order.

12/ While 1-1/5 miles is closer to the 1¼ miles than 1-3/4 miles and thus of probative value, it should be noted that the line of vegetation shown on the Anchorage and Vicinity Map is sharply indented at this section line because of a creek. This same measurement taken on the official survey plat (JA 60), which shows the meander line as opposed to the line of vegetation, indicates a distance of 1¼ miles to the meander. Of course, the function of a meander is to eliminate such small irregularities along the coast.



SCALE 1: 24000

1 ½ 0 1 mile

TRACING OF PERTINENT PART OF U.S. GEOLOGICAL SURVEY MAP

ANCHORAGE AND VICINITY, ALASKA
N6104-W14937.5/16X27.5
1962

(This excerpt is taken from the center of the southern most area shown on the map.)

2. The stated purpose of the order supports Interior's construction and is incompatible with the order of the district court. - Section 5 of Public Land Order 576 commences with the words:

> Under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage Seward highway.

Thus, the order on its face indicates the purpose of the withdrawal. As is the case with congressional intent (cf. Miller v. Udall, 115 U.S. App. D.C. 162, 317 F.2d 573 (1963); Myers v. Hollister, 96 U.S. App. D.C. 388, 226 F.2d 346 (1955), cert. den., 350 U.S. 987), the expressed intent of the enacting agency should bear great weight in assisting the court to construe an ambiguous phrase (line of mean high tide) in a Land Order.

We respectfully submit that of the two possible constructions of P.L.O. 576 suggested in this lawsuit, that of the Interior Department, reserving only dry, fast upland for the relocation of the highway, is the only reasonable one. If the area withdrawn in 1949 for relocation of the highway were measured from the Borax line, it would consist largely, if not wholly, of unfirm land in the form of boggy mud flats. There can be no doubt, we submit, that such a construction was not

intended by drafters of the order.[13]

3. From a surveying standpoint, the seaward line intended by the order was necessarily the meander line. - Almost invariably, when a navigable body of water covers part of a land section, surveyors employ a line meandered along the escarpment on the soil and edge of vegetation in order to indicate where the land meets the water on official plats and surveys.[14] This line is called the meander line. It is a series of straight lines, roughly approximating the sinuous contour of the body of water, which are drawn along the physical evidence impressed on the shore by the constant action of the tide.

To an Interior Department surveyor the phrase at issue here, "line of mean high tide," does not have any set meaning approaching a term of art.[15] The reasons why cadastral

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13/ In this connection, appellee argued below that the withdrawal order could not prevent the issuance of the patent, since the highway had been relocated in 1952 and, thus, the order was without further purpose. While such contention is readily answered by pointing out that Congress has delegated the power to classify the public lands to the Secretary of the Interior and to no one else, it is also noteworthy that this area remains substantially withdrawn, even though P.L.O. 576 has been revoked. P.L.O. 1654 of June 13, 1958, 23 Fed. Reg. 4411, revoked P.L.O. 576 and withdrew a smaller but similar area along the highway for the preservation of scenic values and public services sites.

14/ II Shalowitz, Shore and Sea Boundaries (1964) pp. 450-451; U.S. Department of Interior, Manual of Surveying Instructions (1947) p. 231; Railroad Co. v. Shurmeir, 74 U.S. 272, 286 (1868).

15/ See discussion infra, this Argument subpart 4, p. 27.

engineers employ meander lines along the edge of vegetation and escarpment make clear the propriety of the administrative construction in this case. The whole science of surveying is based upon straight geometric lines. A curved line cannot be run on the ground but must be approximated by a series of straight lines as with a meander line. 16/ In addition, surveyors find it impossible or highly impractical to operate in the sand and mud that is found adjacent to the true average of high tide. Not only is the line of escarpment and vegetation used to prevent the engineer from having to operate his transit with one foot in the water, so to speak, it also provides permanent fast land on which he can fix his monuments

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16/ U.S. Coast and Geodetic Survey fixes lines depicting the means of the tides by applying tidal elevation data to time control infra-red aerial photographs of the shore in an area. This procedure is extremely expensive, as weather and tidal conditions only infrequently permit the land, sea and air coordination required for scientific accuracy. While some of the necessary data has been collected along Turnagain Arm, Coast and Geodetic Survey has indicated that complete findings will not be available before 1969.

While aerial photography will serve to designate the Borax line of mean high tide on a map, the task of staking off the reserve on the ground would remain for cadastral engineers. As a practical matter, only monuments on the ground would inform a person whether he were standing (or homesteading) within or outside the reserve.

without fear of their washing away, [17] as would be the case with the area around the Borax line that is flooded by the higher tides.

That monuments on the ground are of such vital importance to the administration of public lands is illustrated by the criminal penalties that accrue to the willful interference with such markers. 18 U.S.C. sec. 111 reads:

> Whoever shall willfully destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post, or any Government line of survey, or shall willfully cut down any witness tree or any tree blazed to mark the line of a Government survey, or shall willfully deface, change, or remove any monument or bench marked of any Government survey, shall be fined not more than $250, or imprisoned not more than six months, or both.

See also 48 U.S.C. sec. 371, the statutory authority under which appellee is seeking a homestead:

17/ See U.S. Department of Interior, Manual of Surveying Instructions, supra, p. 243, "Construction of Monuments and marking for identification":

> 243. The caps of the iron posts are to be plainly marked with steel dies at the time when used; the posts will be set in the ground about three-fourths of their length; and earth and stone, if the latter is at hand, will be tamped into the excavation to give the post a solid anchorage.

> [T]he location so made shall be marked upon the ground by permanent monuments at each of the four corners of the said location, so that the boundaries of the same may be readily and easily traced; * * *.

It would reasonably be expected that an area to be segregated from the public domain would similarly be designated on the ground by permanent monuments. Only the Secretary's interpretation, it seems, would allow for the erection of these monuments.

Perhaps most convincing from a surveying standpoint is the impossible feat that this Public Land Order requires a cadastral engineer to accomplish when the Borax line is to be employed. First, it is necessary to note that the Borax line is arrived at wholly in terms of a vertical elevation. Aaron L. Shalowitz, Special Assistant to the Director of U.S. Coast and Geodetic Survey, in his book Shore and Sea Boundaries, Vol. I, p. 89, states the concept in the following terms:

> 64. DEMARCATION OF TIDAL BOUNDARIES
>
> Boundaries determined by the course of the tides involve two engineering aspects: a vertical one, predicated on the height reached by the tide during its vertical rise and fall, and constituting a tidal plane or datum, such as mean high water, mean low water, etc.; and a horizontal one, related to the line where the tidal plane intersects the shore to form the tidal boundary desired, for

> example, mean high-water mark, mean low-water mark. (See fig. 20) The first is derived from tidal observations alone, and, once derived (on the basis of long-term observations), is for all practical purposes a permanent one. The second is dependent on the first, but is also affected by the natural processes of erosion and accretion, and the artificial changes made by man. 18/ A water boundary determined by tidal definition is thus not a fixed, visible mark on the ground, such as a roadway or fence, but represents a condition at the water's edge during a particular instant of the tidal cycle.

Thus, once sufficient United States Coast and Geodetic tidal elevations have been compiled, all that is necessary to find "mean high tide" under Borax at one certain location is the proper elevation measured against the beach.

By contrast, all public land surveys are based upon straight lines, which are located in terms of coordinates made up of range lines and township lines, which are in turn based on meridians of longitude and parallels of latitude. Every line in a survey can be fixed on a horizontal plane in terms of metes and bounds distances from such fixed coordinates.

18/ The effects of erosion and accretion upon the Borax line are considered infra, Argument IIB.

P.L.O. 576 is written in terms of metes and bounds distances, and calls for a line one mile inland and parallel to "line of mean high tide." By the wording of the order, a surveyor must first establish "line of mean high tide" and then draw a line parallel to it one mile inland. If a surveyor has a straight line or a series of them (as he would have with the meander line), the task of locating this inland parallel line is accomplished by computing its coordinates from those of the base line, and locating the new coordinates on the ground. However, the Borax line is defined not in terms of horizontal coordinates but rather in terms of elevation, from which there is no mathematical method of determining coordinates of the new line. In other words, geometrically speaking, the line is an infinite series of points at a uniform elevation but, since the contour of the earth is uneven, this line is an extremely sinuous one on a horizontal plane. 19/

19/ Common experience tells us that nowhere is land so level that a tide would fall in a geometrically straight line. Sea level being a constant, the sinuous nature of the edge of the tide is due to different elevations along the coast, and is thus proof of a shore's irregularity.

Since the Land Order speaks wholly in horizontal terms, the surveyor would, under the holding of the court below, be faced with the task of reckoning a line one mile inland, 11 miles in length, parallel to a line, the sinuosities of which defy geometrical description. As a practical matter, this cannot be done. There is no surveying instrument presently known which can trace on the ground a line parallel to an irregularly curving line.

4. The words "line of mean high tide" would mean the meander line to a cadastral engineer. - The court's order below indicates that the judge felt the phrase "line of mean high tide" was to be construed in vacuo as a term of art and could only be defined as the Supreme Court had done in Borax, Ltd. v. Los Angeles, supra.[20/] Besides the fact that,

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20/ In fact, a close reading of the Borax opinion itself indicates that the Supreme Court in that case used seven different phrases referring to the true average of the high tides, none of which included "line of mean high tide": (1) "the mean high tide" (296 U.S. at 14, 27); (2) "high water mark" (296 U.S. at 22); (3) "line of high water" (296 U.S. at 22); (4) "ordinary high water mark" (296 U.S. at 22); (5) "line of ordinary high water mark" (296 U.S. at 23); (6) "line of ordinary high water" (296 U.S. at 23); (7) "mean high water" (296 U.S. at 26). While all of these phrases are very much alike, they indicate that the Supreme Court was defining a concept and clearly had no intention of creating a term of art.

as we have demonstrated in Argument IA, the district court was not presented with the task of giving a "words and phrases" definition to the term, we think that the phrases employed by Interior Department surveying manuals in referring to the meander line serve to illustrate that to a cadastral surveyor the term "line of mean high tide" would have a meaning other than the line referred to in the Borax opinion. The Department of the Interior's Manual of Surveying Instructions of 1894 (p. 58) referred to the meander line as the "high water line." Likewise, the current Interior Department Manual of Surveying Instructions (1947) uses the following language (at p. 231):

> 226. All navigable bodies of water and other important rivers and lakes (as herein after described) are to be segregated from the public lands at mean high water elevation. The traverse of the margin of a permanent natural body of water is termed a meander line. * * * (Emphasis added.)

This same language was used in the 1930 edition of Manual of Surveying Instructions at page 216, sec. 226.

The Interior Department officials, then, in drafting a Public Land Order (concerning an unsurveyed area) that would have meaning to surveyors, could reasonably use the words "line of mean high tide" in referring to the meander line.

II

THE TRIAL JUDGE'S RELIANCE UPON BORAX, LTD. V. LOS ANGELES WAS MISPLACED AND LEADS TO AN UNREASONABLE RESULT

A. In Borax, the Supreme Court addressed itself to a different question. - Here we are concerned with construing P.L.O. 576 in order to determine the location of a land withdrawal in relation to appellee's homestead application. No question exists as to the location or extent of the property in the application. It is the location of the land withdrawn that is at issue.

On the other hand, in Borax, the Supreme Court held that, for purposes of determining the limits of the legal rights between a tideland owner and an upland owner, "mean high tide" should be employed. The Court then defined this term as the "average height of all the high waters at that place over a considerable period of time" (18.6 years); thus, the method used by the U.S. Coast and Geodetic Survey in measuring high tides was adopted. In so holding, the Court rejected the district court's finding that the U.S. Land Office Survey based on the meander line constituted the boundary for title purposes.

A reading of that opinion clearly indicates that the Court there was concerned solely with the extent of the rights which follow from an unambiguous grant bordering a navigable body of water. As is the case with all federal patents, the meander line represents the seaward extremity of the property on official descriptions and survey plats. See Railroad Co. v. Schurmeir, 74 U.S. 272, 286 (1868). Such plats never show the area of upland between the meander line and the tidelands. It was to the question of what rights does a patent describing land as bordering tidal waters give to these areas that the Borax court addressed itself. In that case, no question existed as to the location of the whole property involved. The language in the patent was clear and unambiguous. The Court was not purporting there to upset the surveying practice which had prevailed for decades, describing waterfronting lands by reference to a meander line.

Here, on the other hand, we are presented with an ambiguous description in a withdrawal order. No title issue is involved, as all the land was owned by the United States. Only the location of the area is to be determined. We are

fully aware of the extent of rights below the meander line.[21/] Thus, Borax does not apply to the question before the court, which was purely one of construction—"what did P.L.O. 576 mean."

Viewed in this light it was error for the court to adopt the Supreme Court's definition of the boundary between an upland and a tideland owner, because of the entirely different context in which the task of construction arose.

B. The Borax line is subject to the effects of accretion and erosion. - Ignoring for the moment the many practical objections raised heretofore to the use of the Borax line from a surveyor's standpoint, we are still faced with the fact that any line at the true average of the high tides would be subject to the effects of accretion and erosion. As noted, supra, the average tidal elevation upon which the Borax line is computed remains for practical purposes constant, but its line of intersection with the shore does not retain any sense of stability on a horizontal plane. We again refer the Court

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21/ Here, just as with a patent, when a one-mile strip was withdrawn with the meander line as its seaward base, the Borax rule operated to withdraw that land extending to mean high tide.

to the above-quoted excerpt from I Shalowitz, op. cit., p. 19. In pointing to the effect of accretion and erosion upon the Borax line, this author says:

> A water boundary determined by tidal definition is thus not a fixed, visible mark on the ground, such as a roadway or fence, but represents a condition at the water's edge during a particular instant of the tidal cycle.

Although there is no scientific data available as to the amount of accretion and erosion in this area, a 30-foot rise and fall of the tide sweeping across the soft earth of wide mud flats can reasonably be expected to cause significant changes from time to time.

Once such erosion (or accretion) occurs when the Borax line is employed, the wording and timing of this particular order present novel questions, which would not arise under the meander line construction. For example, what happens to the parallel line one mile inland called for by the order when the shore (and necessarily the Borax line) moves in an inland direction due to erosion? 22/ On the other hand, the

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22/ A question analogous to this was raised in DeLancey v. Wellbrock, 113 Fed. 103, 105 (S.D. N.Y. 1902). That case involved a patent granting a 400-foot-wide strip of submerged land with the shoreline as its inland boundary. The court ruled that the grant maintained its width, both borders moving respectively seaward or inland as the shore was affected either by accretion or erosion.

question arises, should the effect of erosion be discounted? And, if so, after what date is erosion discounted? Was the line fixed at the time of P.L.O. 576's promulgation, 1949? The date of the district court's order, 1967? Or the date of U.S. Coast and Geodetic's determination of the line in 1969?

The Secretary's construction avoids all of these questions. Upon survey, the meander line is permanently fixed in terms of coordinates. The inland edge of the reserve would not move, no matter how far the land eroded away. However, there would be far less chance of erosion affecting points on the fast upland where the surveyor runs his meander. Unlike the area farther out on the mud flats, the points of vegetation and escarpment would be likely to change very little from the time of the promulgation of the order in 1949 until the completion of the survey in 1955.

We submit that the many problems arising from the use of the Borax line leave no doubt as to which line more reasonably delimits the reserve.

III

THE ERRONEOUS ISSUANCE OF HOMESTEAD PATENTS FOR ADJACENT LANDS IS IRRELEVANT

In the district court, appellee asserted that the Secretary of the Interior was estopped from refusing to issue appellee's patent by virtue of his previously having issued two patents to adjacent lands which appear to be within the area withdrawn. This argument is without legal foundation.

Generally, the Federal Government cannot be estopped by the mistaken acts of its agents. Kondo v. Katzenbach, 123 U.S. App. D.C. 12, 17, 356 F.2d 351, 356 (1966); Legerlotz v. Rogers, 105 U.S. App. D.C. 256, 266 F.2d 457, 459 n. 5 (1960), cert. dism., 362 U.S. 938; Beaver v. United States, 350 F.2d 4, 9 (1965); United States v. State of California, 332 U.S. 19 (1947). This is equally true of administrative determinations. Robertson v. Udall, 212 U.S. App. D.C. 218, 349 F.2d 195 (1965); Walker-Hill Co. v. United States, 162 F.2d 259 (C.A. 7, 1947), cert. den., 332 U.S. 771. And this is particularly the case with respect to public land policies and the preservation of the public interest by the Secretary of the Interior. Utah Power and Light Co. v. United States, 243 U.S. 389 (1916); United States v. San Francisco, 310 U.S. 16 (1940); cf. Causey v. United States, 240 U.S. 399, 402 (1916).

Here, since the two patents pointed to by appellants applied to lands previously withdrawn from the public domain, the action of Interior officials in issuing them was unauthorized. It is settled beyond cavil that such actions cannot estop the United States. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); United States v. Crance, 341 F.2d 161 (C.A. 8, 1965); United States v. Haffort, 256 F.2d 186 (C.A. 8, 1958). In any case, the situation here presented does not contain the elements of estoppel. To be estopped, among other things a party must know the facts and intend that his conduct be acted upon. California State Board of Equalization v. Coast Radio Products, 228 F.2d 520, 525 (C.A. 9, 1955). Here, neither of these factors can be attributed to the Government.

Further discussion of the law is unnecessary, as appellee's argument places him in the position of attempting to force the Interior Department to perpetuate an error. We only pause to point out that the decisions to issue patents were made prior to the official survey of this area, December 22, 1954 (JA 18).[23/] As we indicated above, the 1949 Land Order

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23/ The decision to grant Mely his homestead patent took place September 3, 1953 (JA 21). A field report (TA 4803), dated September 29, 1953, relying on this Mely decision, determined that a patent could be granted to Lewis Oelschlaeger (JA 19).

could only be practically administered upon the determination of its exact location by the Bureau of Land Management Official Survey. Thus, it is understandable how these homesteads were allowed at a time when the exact location of the reserve was unknown. On the other hand, Oelschlaeger's application of January 31, 1955, came after the official 1954 survey.

Finally, this argument completely fails, when it is noted that the original administrative decision of the Land Office Manager indicates that on several occasions prior to the decision Oelschlaeger had been verbally advised by the Land Office of this possible conflict [24/] (JA 25).

24/ The pertinent paragraph of the Land Office Decision reads:

> Mr. Oelschlaeger was never notified that the land was open to settlement or entry. He and his Father, who had an adjoining homestead, were advised verbally at the Land Office on several occasions of this conflict and that settlement was at their own risk. Since no valid rights to land can be acquired while in a withdrawn status, the location notice is hereby rejected. (Anne V. Hestnes, A-27096, June 27, 1955; Rafael D. Tobar, A-27008, December 13, 1954).

CONCLUSION

For the foregoing reasons, we submit that the order of the district court should be vacated, and that its judgment denying appellants' motion for summary judgment should be reversed.

Respectfully,

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September, 1967.

BRIEF FOR
RICHARD L. OELSCHLAEGER,
APPELLEE

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,127

STEWART L. UDALL,
SECRETARY OF THE INTERIOR,
ET AL.,

Appellants,

v.

RICHARD L. OELSCHLAEGER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether the Secretary of the Interior may interpret his own Public Land Order in such a manner that the clear language of the Order is changed, the area withdrawn by the Order from settlement, location, etc., is shifted to a different location, and the Secretary is afforded a basis for refusal to issue a homestead patent to an entryman who has properly entered and settled public lands of the United States, under the homestead laws.

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*Cases, etc., chiefly relied upon are marked with an asterisk.

STATEMENT OF THE CASE

By Public Land Order 576, dated April 6, 1949, 14 F.R. 1614, the Secretary of the Interior withdrew certain public lands of the United States in the then Territory of Alaska for various purposes. That portion of the Public Land Order which is pertinent to this case withdrew lands described in the order as "parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm" for a purpose stated in the Order to be relocation of a highway. Turnagain Arm is a body of water off the coast of Alaska, and bounding the coast of the withdrawn land (JA 29).

The withdrawn lands had not been surveyed at the date of publication of the Public Land Order.

In 1949, one Thomas N. Mely, and one Louis Oelschlaeger, step-father of the Appellee herein, initiated homestead entries on unsurveyed public lands of the United States in the Territory of Alaska, in the general area of the withdrawn lands. The relative positions of the Mely and Louis Oelschlaeger homestead entries, and the Richard Oelschlaeger homestead entry, are shown on the plat submitted to the District Court as Plaintiff's Exhibit "A" (JA 59), in accordance with stipulations entered therein.

The Bureau of Land Management, a Bureau of the Department of the Interior, initiated a contest against the homestead entry of the said Thomas N. Mely, alleging that the lands entered by Mely were within the area withdrawn by Public Land Order 576. After involved and lengthy proceedings in the Bureau of Land Management (JA 19), a decision was issued September 3, 1953 (JA 21) by the Acting Manager of the United States Land Office, Anchorage, Alaska, which is an office of the Bureau of Land Management, dismissing the contest of the Bureau of Land Management against the Mely homestead entry upon the finding of fact made by the Acting Manager that the entry of Thomas N. Mely did not lie in whole or in part within the area withdrawn by Public Land Order 576. The Bureau of Land Management took no appeal from this dismissal of its contest against the Mely entry (JA 21).

In March, 1954, after the dismissal of the Government's contest against the Mely entry, Appellee Richard Oelschlaeger established residence upon a homestead claim on unsurveyed public lands of the United States in the Territory of Alaska. The entry was assigned serial number Anchorage 026482 (JA 18). The Richard Oelschlaeger claim adjoins both the Mely claim and the Louis Oelschlaeger claim (JA 59).

On October 28, 1954, a plat of survey was accepted, and thereafter officially filed on December 22, 1954, covering the lands embraced in these three homestead entries (JA 60). On January 31, 1955, in response to a demand by the Anchorage Land Office dated January 17, 1955, Appellee Richard Oelschlaeger filed an amended homestead entry application for surveyed lands, in accordance with the officially filed plat of survey. According to that plat (JA 60), the lands entered by Appellee are described as follows:

Township 11 North, Range 3 West, Seward Meridian, Alaska

Section 3:	W½SE¼SW¼	
10:	E½NW¼	(JA 18).

On April 20, 1955, Appellee filed his final proof, and submitted supplemental evidence supporting such final proof on June 14, 1955 and November 30, 1955 (JA 19).

On April 27, 1955, some five months after the filing of the plat of survey, a patent for public lands of the United States was issued by the Bureau of Land Management to Thomas N. Mely, covering his homestead claim (JA 21).

On October 10, 1955, ten months after the filing of the plat of survey, a patent for public lands of the United States was issued by the Bureau of Land Management to Louis Oelschlaeger for his homestead claim (JA 21).

On November 19, 1956, the Manager of the United States Land Office in Anchorage, Alaska, issued his decision rejecting Appellee's homestead location notice, application to enter and final proof, on the basis that the lands covered by the entry were withdrawn by Public Land Order 576

(JA 24). Appeal was taken from this decision of rejection, and on October 23, 1959, the Director of the Bureau of Land Management issued his decision affirming the decision of the United States Land Office, Anchorage, Alaska (JA 26). On Appeal, the Secretary of the Interior, acting through his Solicitor, issued his decision on June 27, 1960 (JA 49), affirming the decision of the Bureau of Land Management.

This action was commenced in the United States District Court for the District of Columbia by filing a complaint on December 29, 1960.[1] The case came before the Court on February 14, 1967, on cross motions for summary judgment (JA 56). The Court determined that the Department of the Interior had never made a finding, in accordance with its own Public Land Order, whether the lands entered by Appellee Richard Oelschlaeger were within the area withdrawn. The Court therefore denied both motions for summary judgment and remanded the case to the Department of the Interior for a finding of whether the lands entered were within one mile of the line of mean high tide of Turnagain Arm, rather than a determination, which the Department had made, that the lands were within one mile of the surveyed meander line, based on the survey filed in 1954, some five years after the order of withdrawal.

Thereafter, appeal was filed on behalf of the Secretary of the Interior (JA 57).

STATUTES INVOLVED

Article 4, Section 3, Clause 2 of the Constitution of the United States reads in pertinent part:

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[1] Appellant's brief, page 5, footnote 7, concludes that this suit was not actively prosecuted by Appellee's attorneys between 1960 and 1967. The present attorneys representing Appellee did not enter an appearance in this matter until 1965. The conclusion of Appellant's attorney as to lack of prosecution of this case will not be supported by the record.

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . ."

The Act of May 14, 1898, c. 299 § 1, 30 Stat. 409, as amended, U.S.C.A. Title 48, § 371 (1952 Ed.), reads in pertinent part as follows:

> "§ 371. Homestead laws extended to Alaska; locations on navigable waters; entries on unsurveyed lands
>
> "All the provisions of the homestead laws of the United States not in conflict with the provisions of this section, and all rights incident thereto, are extended to the Territory of Alaska, subject to such regulations as may be made by the Secretary of the Interior; . . ."

The Act of March 3, 1891, c. 561, § 5, 26 Stat. 1097, as amended, U.S.C.A., Title 43, § 161 (1964 Ed.), provides in part:

> "§ 161. Entry of unappropriated public lands
>
> "Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, . . ."

The Act of June 6, 1912, c. 153, 37 Stat. 123, as amended, U.S.C.A. Title 43, § 164 (1964 Ed.), provides in part:

> "§ 164. Certificate or patent; issuance
>
> "No certificate shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, . . . proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term

> of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in Section 174 of this title, and that he, she or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: . . ."

The Act of March 1, 1901, c. 674, 31 Stat. 847, as amended, U.S.C.A. Title 43, § 272 (1964 Ed.), provides in part:

> "§ 272. Deduction of military and naval service from time required to perfect title; rights of widows and children of veterans
>
> "The time which the homestead settler has served in the Army, Navy, or Marine Corps of the United States shall be deducted from the time otherwise required to perfect title, . . ."

The Act of February 18, 1875, c. 80 § 1, 18 Stat. 317, as amended, U.S.C.A. Title 43 § 2 (1964 Ed.), provides:

> "§ 2. Duties concerning public lands
>
> "The Secretary of the Interior, or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

SUMMARY OF ARGUMENT

The disposition of the public lands of the United States is reserved by the Constitution to the Congress. The Congress has enacted certain statutes under the terms of which citizens may enter the public lands, and upon compliance with the statute, gain title to the lands. Those statutes are administered by the Secretary of the Interior.

The duties of the Department of the Interior in this instance are to administer the statutes. The Department has no discretion, except to determine whether the entryman has complied with the statutory requirements which will entitle him to patent. Upon a finding that these requirements have been met, the Department is required to issue a patent.

Appellee insists that he has entered public lands of the United States which were available for homestead entry. Certain lands in the area of his homestead entry were withdrawn by Public Land Order 576, which measured the area withdrawn from the line of mean high tide of Turnagain Arm, a body of water.

The phrase "line of mean high tide" as used in the Public Land Order can have only one meaning, i.e., the boundary of public lands. The method of fixing that boundary has been long established. and the Secretary of the Interior has not followed that method in his decisions which purport to fix the withdrawn area.

The Secretary may not change the boundary of the withdrawn area, some years after the withdrawal, by the filing of a plat of survey. While it is the duty of the Bureau of Land Management to survey areas of the public land, and create boundaries, the Secretary's holding in this case amounts to a determination of ownership. The Bureau of Land Management may not fix titles by the filing of plats of survey.

Great deference is shown to the interpretation of his own regulations by an administrative officer. Where the regulation or in this case, the Public Land Order, is in clear and unambiguous language, no interpretation is required, and the Secretary, as well as those charged with constructive notice of the contents of the order, is bound by the contents of the order.

The purpose of the interpretation of the Public Land Order is not clear. The purpose for which the Order was issued ceased to exist some two years before the Appellee

made his homestead entry. The sole result of the Secretary's interpretation of the order is to defeat this homestead entryman's right to patent.

As a matter of law, Oelschlaeger is entitled to patent, if in fact the lands entered by him lie more than one mile from the line of mean high tide of Turnagain Arm. The Secretary of the Interior may not interpret his public land order in such a way to vary the terms of that order for the sole purpose of defeating this homestead entry.

ARGUMENT

I

The Rights of a Citizen To Enter Public Lands of the United States and Obtain a Patent for Those Lands Are Statutory Rights, Not Dependent Upon The Department of the Interior

The right to enter public lands of the United States and to establish residence thereon, to cultivate the lands, and finally to obtain a patent covering the lands is a right granted citizens of the United States by the Congress under its Constitutionally derived power to dispose of the public lands. The right is therefore derived, not from rules or regulations of the Department of the Interior, but from statute.

The administration of those statutes has been assigned to the Department of the Interior.

It is not doubted that in the administration of many statutes relating to the public lands of the United States, the Secretary of the Interior has been delegated broad discretion. Thus, in the administration of the *Mineral Leasing Act* (Act of February 25, 1920, c. 85 § 1, 41 Stat. 437, as amended, U.S.C. Title 30, § 181, et seq.), we find that the Secretary, while under duty to award a lease to the first qualified applicant, may nevertheless determine not to lease at all, or may make the necessary rules and regulations as an aid to the Department in determining which of two competing applicants is, in fact, the first qualified ap-

plicant. The Courts have long deferred to the Secretary's interpretation of his own rules and regulations relating to such activities, and have adopted standards and tests which preclude a substitution of their own judgment for that of the Secretary of the Interior, unless he is plainly wrong. *Udall v. Tallman*, 380 U.S. 1, 13 L. ed 2d 616, (1965).

No such area of discretionary authority is found in the statute relating to the administration of the homestead laws. The Secretary of the Interior administers the statutory grant to the homestead entryman upon his compliance with certain requirements concerning residence, cultivation, etc.

If there is a single judicial thread distinguishing cases dealing with homestead entries from other cases relating to the authority of the Secretary of the Interior in the administration of the public land laws, it might properly be said that the distinguishing factor is that the Secretary has been repeatedly reminded that the homestead laws are to be liberally applied. In *Ard v. Brandon*, 156 U.S. 537, 39 L. ed 524 (1895), the Supreme Court of the United States stated the principle:

> ". . . The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application." (156 U.S. 543).

In more recent cases, the Courts have spoken as strongly, and have coupled this admonition with the safeguards of the *Administrative Procedure Act*, (Act of June 11, 1946, ch. 324, § 2, 60 Stat. 237, as amended. U.S.C. Title 5, § 1001 et seq.). In *Stewart v. Penny*, 238 F. Supp. 821, U.S.D.C., Nevada (1965), the Court said:

> "The omnipotence of the Department of the Interior as guardian of the public domain is exhibited when the Department acts affirmatively and grants patents

> under the public land laws. The converse is not true. An entry or application for patent which is contested or rejected by the Secretary presents issues regarding the legal rights of the entryman under the public land laws. These are rights established by Congress which the Secretary of the Interior may not arbitrarily or capriciously ignore and which must be determined within the due process safeguards of the Administrative Procedure Act." (238 F. Supp. 827).

And in *Coleman v. United States*, 363 F.2d 190, U.S.C.A., 9th Circuit (1966), the statement of the Court was equally vigorous:

> "It has long been established that a qualified entryman upon public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under others of the multifarious laws governing entries on public lands, who peffects his entry by compliance with the applicable Act of Congress, thereby acquires a right to the land as against the sovereign itself, as well as third persons. *Wilbur v. United States ex rel Krushnic*, 1930, 280 U.S. 306, 50 S. Ct. 103, 74 L. Ed. 445. It is such a legal right which appellant here seeks to assert, and it is not a right which the Secretary of the Interior may, in his discretion, ignore or which he may reject 'in the absence of fraud or other imposition.' This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious and illegal deprivation by action of executive and administrative agencies. *Adams v. Witmer*, (9 CCA 1959), 271 F.2d 29." (363 F.2d 196).

The right of Richard Oelschlaeger to a patent for the public lands which he has entered does not, therefore, depend upon any discretionary authority of the Secretary of the Interior, but rather depends solely upon his compliance with the statutory grant.

II

The Phrase "Line of Mean High Tide" Has a Distinct Meaning in Law

Public Land Order 576, withdrawing lands in the vicinity of this homestead pending relocation of a portion of the Anchorage-Seward Highway, described the withdrawn area as "lands within 1 mile of the line of mean high tide of Turnagain Arm." Turnagain Arm is a body of water (JA 29).

Appellee contended in the Department of the Interior that the line of mean high tide was the boundary of the public lands, and that the withdrawn area must be measured from that point. It was repeatedly pointed out on behalf of Appellee that the decision of the Supreme Court of the United States, in *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 80 L. ed. 9 (1935),[2] was controlling, and that the line of mean high tide must be determined in the manner set forth in that case. Appellee did not contend then, and does not contend now, that the line of mean high tide must be determined by United States Coast and Geodetic Survey. Rather, Appellee contended that the Court had therein outlined the correct manner for determining this line, which is in fact a line fixing ownership.

The decision of the Secretary of the Interior, acting through his Solicitor (JA 49) which is presented for review by this Court contains little or no reasoning justifying its conclusion that for the purposes of the order of withdrawal the phrase "line of mean high tide" is to be regarded as the equivalent of the phrase "surveyed meander line." Rather, the decision of the Secretary simply adopted the reasoning of the decision of the Director of the Bureau of Land Management.

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[2]This case, and the line of mean high tide as defined in the case, will be referred to hereafter as the *Borax* case, and the *Borax* line.

The holding of the Director can best be summarized by one paragraph from his decision:

> "But the answer to this [Appellee's contention that the *Borax* line must be used to determine the withdrawn area], in the light of the foregoing discussion, is that the determination of the line of mean high tide, in the technical sense meant by the appellants, has no bearing upon the resolution of this case; although useful for certain purposes, it would not affect or establish the location of the boundary of the public lands. The phrase, 'line of mean high tide' in a public land order, means only 'boundary of the public land,' or 'meander line.' Although a meander line does not delimit a private owner's holding (he owns to the water's edge), it does delimit what the Land Department has jurisdiction over, and may dispose of: the meander line is a means of ascertaining, in fractional portions of the public lands bordering on navigable waters, the quantity of land in the fraction subject to sale, which is to be paid for by the purchaser. *Railroad Company v. Schurmeir*, 74 U.S. 272, 286 (1868). The plat of survey is conclusive as to the acreage of land in legal subdivisions, and the land has to be sold on the basis of the acreage shown by the plat. *Scott K. Snively* (On Petition), 49 L. D. 583 (1923)." (JA 41).

In summary, the Director has concluded as follows:

1. The location of the *Borax* line "would not affect or establish the location of the boundary of the public lands."
2. When used in a public land order, the phrase "line of mean high tide" means "boundary of the public lands," or "meander line."
3. The meander line delimits the land over which the Land Department has jurisdiction and which it may dispose of, although it does not delimit the private owner's holding.

Each of these conclusions is wrong as a matter of law.

A. The Borax Line Is the Boundary Line Between the Uplands and Tidelands

Appellant throughout this proceeding has dismissed as inapplicable the case of *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 80 L. ed. 9 (1935). While the factual situation of that case may appear on the surface to differentiate the case, the question to be determined there, as here, was the extent of public lands where the lands border on navigable waters subject to the ebb and flow of the tides. Ownership of valuable tidelands was at issue. Petitioners there claimed under a Federal patent which conveyed land bordering on the Pacific Ocean. There was no question but that the United States was free to convey the upland, nor was there any question but that the United States conveyed all the title it had in the premises. The question was the extent of the Federal grant.

In deciding the case, the Supreme Court said:

> "The Circuit Court of Appeals disagreed with this view [of the District Court] as to the conclusiveness of the survey and the patent. The court held that the Federal Government had neither the power nor the intention to convey tideland to Banning, and that his rights were limited to the upland. The court also regarded the lines shown on the plat as being meander lines and the boundary line of the land conveyed as the shore line of Mormon Island. The court declined to pass upon petitioners' claim of estoppel in pais and by judgment upon the ground that the question was not presented to or considered by the trial court, and was also of the opinion that the various questions raised as to the failure of the city to allege and prove the boundary line of the island were important only from the standpoint of the new trial which the court directed. 74 F.(2d) p. 904. For the guidance of the trial court the Court of Appeals laid down the following rule: The 'mean high tide line' was to be taken as the boundary between the land conveyed and the tideland be-

longing to the State of California, and in the interest of certainty the court directed that 'an average for 18.6 years should be determined as near as possible by observation or calculation.' Id., pp. 906, 907" (296 U.S. 14, 15).

* * *

"The tideland extends to the high water mark. *Hardin v. Jordan*, supra (140 U.S. 381, 382, 35 L. ed. 433, 11 S. Ct. 808, 838); *Shively v. Bowlby*, supra (152 U.S. 1, 38 L. ed. 331, 14 S. Ct. 548); *McGilvra v. Ross*, 215 U.S. 70, 79, 54 L. ed. 95, 100, 30 S. Ct. 27. This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides." (296 U.S. 22).

* * *

"In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that 'mean high water at any place is the average height of all the high waters at that place over a considerable period of time,' and the further observation that 'from theoretical considerations of an astronomical character' there should be 'a periodic variation in the rise of water above sea level having a period 18.6 years,' the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, 'an average of 18.6 years should be determined as near as possible.' We find no error in that instruction." (296 U.S. 26, 27).

From and after that date, there appears to be little question but that the Courts, and the Department of the Interior in all cases save this, have followed this definition and this method for determining the boundary of uplands in an area such as this.

In fact, at the time the Department of the Interior issued its decision in this case, it was involved in litigation in which it urged this very method of determining such a

boundary. In that case (*United States v. State of Washington*, 294 F.2d 830, U.S.C.A., Ninth Circuit (1961)), the uplands belonged to the United States subject to a trust patent issued in 1916 to a Quinault Indian. The question presented was the extent of ownership of the accretions to the uplands. The lands had been surveyed in 1858 and since that date, the ordinary high water mark in front of the lands had moved gradually seaward due to imperceptible accretion. Washington was admitted to the Union on November 11, 1889, and the District Court applied what it understood to be the local rule of property established in the State of Washington, and held the boundary between Government-owned uplands and State-owned tidelands to be the ordinary high water mark when Washington was admitted to the Union. The United States appealed, urging that Federal law controlled, and the Court of Appeals reversed the judgment of the District Court in the following language:

> "In the case of tidal waters such as are involved here, the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water. The latter method of making this determination, which was followed by the district court, is appropriate only in the case of streams and other nontidal waters which have no absolute ascertainable level because of variations of flow from a multitude of causes.
>
> "As was testified to for the Government by the supervisor of the Northwest District of the United States Coast and Geodetic Survey, the definition of mean high tide is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years. *Borax Consolidated, Ltd., v. City of Los Angeles*, supra, 296 U.S. at pages 26-27, 56 S. Ct. 23, 80 L. Ed. 9. This is an unchanging elevation, and the line of mean high tide is where that unchanging elevation meets the shore as it exists at any particular time." (294 F.2d 834 (1961)).

Thus, the Court accepted and adopted in 1961 at the insistence of the Department of the Interior the very position which the Department in its decision of 1960 denied.

The same phrase "line of mean high tide" is used to designate the boundary of lands, title to which was confirmed in the States by the *Submerged Lands Act.* (Act of May 22, 1953, ch. 65, title I, § 2, 67 Stat. 29, 43 U.S.C., 1301.) The Submerged Lands Act is applicable to the State of Alaska. (*Alaska Statehood Act*, Section 6(m), 72 Stat. 339; *cf.* Solicitor's Memorandum M-36650, March 29, 1963 (70 I.D. 107)).

There is no question but that the line of mean high tide, as determined by the Supreme Court in *Borax*, is the boundary of public lands. The decision of the Department of the Interior is plainly wrong as a matter of law.

B. The Phrase "Line of Mean High Tide" Means the Boundary of the Public Lands. A Surveyed Meander Line Is Not a Boundary of the Public Lands

The authorities cited above clearly establish the meaning of the phrase "line of mean high tide" in law. If, however, the Department of the Interior insists that the phrase "line of mean high tide" can mean both boundary of the public land and surveyed meander line, then it is contradicted by its own *Manual of Surveying Instructions*, 1947. That *Manual* states, with relation to surveys of lands bordering on navigable waters which are subject to the ebb and flow of the tides, as follows:

> "226. All navigable bodies of water and other important rivers and lakes (as hereinafter described) are to be segregated from the public lands at mean high-water elevation. The traverse of the margin of a permanent natural body of water is termed a meander line. In original surveys, meander lines are not run as boundary lines but for the purpose of defining the sinuosities of the bank or shore line, and for ascertaining the quantity of land remaining after segregation of the water area.
>
> * * *

> "Numerous decisions in the United States Supreme Court and many of the State courts assert the principle that meander lines are not boundaries defining the area of ownership of tracts adjacent to waters. The general rule is that meander lines are not run as boundaries, but to define the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey, the stream, or other body of water, and not the meander line as actually run on the ground, being the boundary. When by action of water the bed of the body of water changes, high-water mark changes and ownership of adjoining land progresses with it. *Lane v. United States*, 274 Fed. 290 (C.C.A. 5, 1921); *Harper v. Holston*, 205 P. 1062 (Wash. 1922)." *Manual of Surveying Instructions*, United States Department of the Interior, Bureau of Land Management, 1947, § 226, Pages 230, 231.

There is absolutely no authority for the Department's assertion that the line of mean high tide, which is the boundary of the public lands, is the same as the surveyed meander line.

C. The Surveyed Meander Line Is Run for the Purpose of Determining the Quantity of Land in the Fraction Subject to Sale or Other Disposal. It Neither Delimits the Lands Over Which the Bureau of Land Management Has Jurisdiction, Prior to the Patent, nor Does It Delimit the Private Owner's Holding After Patent

The assertion by the Department of the Interior that the jurisdiction of the Land Department is limited to those lands shown within the surveyed area and bounded by the surveyed meander line is not supported by the authorities.[3]

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[3] Appellant's brief in this matter, page 31, footnote 21, states without any authority that a withdrawal measured from a surveyed meander line would extend seaward to the *Borax* line. How can this assertion be justified in view of the Department's denying that it has any authority beyond the surveyed meander line?

It is elementary that one claiming under a patent from the United States, which conveys the lands by describing legal subdivisions, as shown on the plat of survey, takes only the title that his grantor, the United States, had. Thus, there is a contradiction in terms to state that the United States grants only to the surveyed meander line, and its grantee somehow takes beyond that line to the line of mean high tide.

Certainly the United States owns beyond the surveyed meander line and the Department of the Interior would, without question, be the first to assert this position in any other proceeding. The grantee of the United States takes by virtue of that title to the line of mean high tide (*Borax Consolidated, Ltd. v. City of Los Angeles, supra* and *United States v. State of Washington, supra.*)

If the Department of the Interior is maintaining that a surveyed meander line fixes the boundary between the uplands and the tidelands, then that holding of the decision is also wrong as a matter of law. While it is true that surveys establish and re-establish boundaries, they do not affect the rights of the owners already existing. The Department has the authority to make surveys and determine boundaries, but is absolutely without authority to determine ownership through such surveys. *United States v. State Investment Company*, 264 U.S. 206, 212; 68 L. ed. 639, 643 (1924); *United States v. State of Louisiana*, 229 F. Supp. 14, 19, U.S.D.C., Western Dist., La. (1964).

The overriding error in law in the decision of the Department of the Interior is its holding that the line of mean high tide and the surveyed meander line are one and the same. From this legal error, there flow the additional errors outlined above.

As a matter of law, the decision of the Secretary is wrong. The judgment of the District Court in remanding this case for further consideration by the Department of the Interior was correct.

III

The Department of the Interior Introduced Irrelevant and Inconsistent Contentions in This Case, but Left Unanswered the Most Important Questions

That part of Public Land Order 576 which deals with an area of land near Appellee's homestead entry withdrew certain lands described therein by approximate metes and bounds descriptions, from all forms of appropriation under the public land laws, and placed those lands under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward Highway. The Public Land Order was issued in 1949, prior to the survey of the lands in question. The withdrawn area was described as an area "1 mile distant from the line of mean high tide of Turnagain Arm". Turnagain Arm is a body of water off the coast of Alaska in this area.

The withdrawal remained in effect, and the lands remained unsurveyed for some years. In the meantime, sufficient work was done on the highway in question to open it to use in 1951, and all work was completed on the highway in 1952. (Director's Decision, JA 45).

Nothing has been offered in this case by the Department of the Interior to justify the necessity of this withdrawal at any time. Certainly, nothing has been offered to justify the continued necessity for this withdrawal after the opening of the highway in 1952.

Nothing has been offered to show the proposed relocation of the highway in question, although claims have been made on behalf of the Appellant that to measure the withdrawn area in the exact terms of the withdrawal, *i.e.*, from the line of mean high tide, would have resulted in a withdrawal of lands not related to the highway. Since nothing has been offered in proof of these facts, they may be and should be dismissed as unsubstantiated pleading. The plain fact is that there apparently was no difficulty in complet-

ing all work in connection with the relocation of the highway under the terms of the Public Land Order as it was then construed.

At all times prior to the filing of the official plat of survey in 1954, two years after the completion of the highway, there was no surveyed meander line from which the withdrawal, according to Appellant's interpretation, should be measured.

How, then, could the withdrawn area be measured at that time? The answer is that the withdrawn area could be measured only from the line of mean high tide, which is the exact line from which the withdrawal should be measured. Although no evidence has been submitted to this Court concerning the location of that line, Appellant nevertheless pleads that the line will not be finally established by the Coast and Geodetic Survey until 1969 (Brief, page 17, footnote 11). Whether this is true is unimportant. The important fact is that there were scientific measurements available from which this line could be approximated at any time, while there was no such data available which would fix the surveyed meander line until the plat of survey was finally filed, some two years after the completion of the highway for which the withdrawal was made.

While the lands remained unsurveyed, but after the completion of the highway, other homestead entries were made adjacent to the entry subsequently made by Appellee Richard Oelschlaeger. In a contest proceeding in which the Bureau of Land Management was a party, the United States Land Office in Anchorage, Alaska, after hearing, made a finding of fact that the lands embraced within the other homestead entries did not lie in whole or in part within the area withdrawn by Public Land Order 576 (JA 21). The Bureau of Land Management took no appeal from this finding, and patents subsequently issued based on these homestead entries, but after the filing of the official plat of survey, which the Bureau admits placed these homestead entries within one mile of the surveyed meander line.

Therefore, at the time Richard Oelschlaeger made his entry, the only interpretation of record by the Department relating to this withdrawal placed the lands which he entered largely, if not wholly, outside the withdrawn area.

This history of the withdrawal and the action of the Bureau of Land Management raises questions which remain unanswered:

1. Why did the Bureau of Land Management take no appeal from the factual finding of its own Land Office that the entries of Thomas Mely and Louis Oelschlaeger, adjoining Appellee's, did not lie within the withdrawn area when it now so strongly contends that they did?
2. Why did the Bureau of Land Management issue patents to Mely and Louis Oelschlaeger after the filing of the plat of survey if, in fact, the lands covered by their homestead entries were within the withdrawn area?
3. What is the necessity for the interpretation of this Public Land Order in a manner which does violence to the language of the Order and attempts to deny a homestead entryman his right to patent, when, in fact, his entry was made some two years after the reason for the withdrawal had ceased to exist?

These questions are not answered by the record presented for review. The Director of the Bureau of Land Management takes the position that he may collaterally overrule a finding by his own Land Office from which he did not appeal. The Director of the Bureau of Land Management and the Secretary of the Interior refuse to grant a hearing in connection with the entry, and adhere to the position, wrong as a matter of law, that the line of mean high tide and the surveyed meander line are one and the same line for the purposes of public land orders.

In the decisions of the Department of the Interior, and in the brief filed in this cause by the attorney for Appel-

lant, many irrelevant, inconsistent, even incorrect contentions have been made which tend to confuse the question presented for consideration.

The question presented is in fact very simple. Does the phrase "line of mean high tide" refer to the boundary of public lands where those lands front on navigable waters subject to the ebb and flow of the tides?

The Department insisted that the case represented in some way a challenge to the system of public land surveys. The case has nothing to do with this system of surveys, and in fact represents no challenge to the actual plat of survey which was filed covering the area in question.

The Department has offered no evidence and none seems available that the plat of survey was incorrectly drawn. If, in fact, the plat was correctly drawn, the line along the shore is a surveyed meander line, according to the Department's own *Manual of Surveying Instructions, supra,* and is not the line of mean high tide. The case is not a challenge to the public land surveys.

In the brief filed for Appellant (page 17, footnote 11), reference is made to the line of mean high tide which apparently is in the process of being established by the United States Coast and Geodetic Survey. The Court will note at that point a statement that the Coast and Geodetic Survey has already established an approximate line of mean high tide in this area.

Contrast this assertion by Appellant with the assertion by the Solicitor of the Department of the Interior in footnote 3 of his decision in this case (JA53) that the method referred to, and apparently being used by the Coast and Geodetic Survey, is a method *formerly* used by the Coast and Geodetic Survey. The clear implication from that footnote is that the method had been abandoned at the date of the decision, June 27, 1960.

It is also interesting to contrast this statement in 1960 that this was a method formerly used by the United States

Coast and Geodetic Survey with the fact that in the case styled *United States v. State of Washington*, 294 F.2d 830. U.S.C.A., Ninth Circuit (1961) *supra*, the Department of the Interior was urging the Court of Appeals of the 9th Circuit to reverse the United States District Court and adopt as the boundary line of public lands bordering on navigable tidal waters the *Borax* line as determined by the United States Coast and Geodetic Survey.

The Director, at page 13 of his decision (JA 43) insists that Appellee Oelschlaeger knew that the area was withdrawn, since he was charged with "constructive notice of the contents of the document" *i.e.*, the Public Land Order, in the Federal Register, citing 44 U.S.C., 1952 Edition, § 307. Appellant now insists, however, that all persons were charged not only with constructive notice of the contents of the document, but also with the fact that the document was written in order that surveyors (Brief, page 21) and cadastral engineers (Brief, page 27) would understand the order. Appellant further insists that the plain wording of the order is incompatible with the stated purpose of the order (Brief, page 20), and that the measurements given in the order, while admittedly in generalities (Brief, page 14) more nearly follow the line surveyed some five years after the order as the surveyed meander line (Brief, page 17 and 18), and therefore it is obvious from the face of the order that the surveyed meander line was meant instead of the line of mean high tide.

Appellant has offered nothing by way of record to show the proposed relocation of the highway in question. We can as easily assume that it was proposed to run the highway toward the shore as we can assume, as Appellant insists, that to measure the withdrawn area from the line of mean high tide would not have extended that area to the proposed location of the highway.

We need assume neither, for the simple answer to all of Appellant's contentions in this respect is that the order was drawn in approximate distances, to be measured from the

"line of mean high tide", the highway was relocated and all work in connection therewith finished in 1952 (JA 45). There is nothing in the Public Land Order to put any person on notice other than that an area within one mile of the line of mean high tide had been withdrawn.

Finally, Appellant devotes a great deal of his argument to this Court to the difficulties of establishing a line one mile landward from the line of mean high tide, the difficulties of surveyors in working in an area such as this, and the difficulties of fixing monuments for this withdrawn area (Brief, pages 21 through 27). There is no requirement of law that an area withdrawn by a public land order be surveyed upon the ground and marked. Certainly Appellee has not requested that this be done. The entire discussion may be of academic interest to an engineer or surveyor, but has absolutely no legal bearing on the question presented for this Court's consideration.

IV

The Judgment of the United States District Court for the District of Columbia in Remanding This Case to the Department of the Interior Was Correct and Should Be Affirmed by This Court

In the District Court, both Appellant and Appellee filed motions for summary judgment (JA 56). The Court denied both motions and entered an order remanding the case to the Department of the Interior, with instructions that the Department determine the line of mean high tide in accordance with the method stated in *Borax*, and thereafter determine whether the lands entered by Richard Oelschlaeger were within a distance of one mile of that line (JA 56).

The filing of motions for summary judgment in the District Court presupposed the admission by both Appellant and Appellee that there were no controverted issues of fact necessary to be determined by the Court in reviewing the administrative decision presented. This was true, and the

propriety of that decision was determined by the Court on the record submitted and the applicable law.

It is however true, as Appellant contends in this Court, that in the area of the withdrawal the Department of the Interior has never made a determination of the location of the line of mean high tide, as measured by *Borax*. Whether any part of Appellee's homestead entry lies within an area of one mile from that line has therefore not been determined.

Since the determination of the actual area withdrawn is necessary before a final determination can be made of the location of Appellee's homestead entry with respect to the withdrawn area, the judgment of the District Court was proper, and is supported by the authorities. In *Pan American Petroleum Corporation v. Udall*, 192 F. Supp. 626, U.S.D.C., District of Columbia (1961), the Court remanded a similar matter to the Department of the Interior:

> ". . . In similar instances, where the actions of an administrative agency have been controlled by the provisions of the Administrative Procedure Act, the United States Supreme Court, and the United States Court of Appeals for the District of Columbia Circuit have indicated that under Section 10 of the Act (5 U.S.C.A. § 1009), a District Court, upon finding that an agency determination is erroneous, and being unable on the record before it to make an alternative determination, is empowered to remand the cause for further agency action. *United States v. Jones*, 336 U.S. 641, 671-673, 69 S. Ct. 787, 93 L. Ed. 938; *Pacific Far East Lines, Inc. v. Federal Maritime Board*, 107 U.S. App. D.C. 155, 275 F.2d 184. Taking into account all the facts and circumstances, hereinbefore set forth, the court concludes that the exercise of the power of remand is justifiable and proper." (192 F. Supp. 630).

It is therefore urged that the order of the District Court was proper, and should be upheld by this Court.

Respectfully submitted,

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REPLY BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 21127

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.,

Appellants

v.

RICHARD L. OELSCHLAEGER,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. EDWARD WILLIAMS,
Acting Assistant Attorney General,

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I N D E X

CITATIONS

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REPLY BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

The brief of appellee, Richard L. Oelschlaeger (hereinafter cited as O. Br.), fails almost completely to meet the contentions made in the Government's opening brief. In the main, Oelschlaeger's brief discusses legal concepts that are not disputed in the least by appellant, while, in appellants' opinion, it ignores the true question presented by the facts of this case.

In a summary fashion we call the Court's attention to the following misconceptions in the appellee's brief.

APPELLEE'S BRIEF ADDRESSES ITSELF TO QUESTIONS NOT HERE INVOLVED

A. This case presents no question of the extent of ownership rights bordering tidelands. - Appellee's brief does not face the question "what land was withdrawn by Public Land Order 576?" Rather it is mainly devoted to the assertion of the principle that the boundary between the uplands and the tidelands is the Borax line. Appellants in no way dispute the correctness of this principle. They only hasten to point out that the concern in this case is the precise location of land withdrawn from settlement by Public Land Order 576 with respect to Oelschlaeger's homestead entry.

The cases relied upon by appellee, Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935), and United States v. State of Washington, 294 F.2d 830 (C.A. 9, 1961), solely concerned what ownership rights were conveyed by federal patents which were adjacent to the tidelands but described in terms of the meander line. No patent has been granted in this case and, furthermore, the land appellee is seeking to acquire does not purport to border on the tidelands. Thus, ownership rights

are not in question. Title to all the land involved is undisputably in the United States.

Appellee makes much of one paragraph of the decision of the Director of the Bureau of Land Management, in the administrative proceedings in this case. By taking the paragraph out of context [the decision is 16 pages long] and then restating it in his own words, he charges legal error (O. Br. 10-11). This is best answered by reading this paragraph in conjunction with the whole opinion. In proper context it in effect states that just as patents to the public lands disregard the area seaward of the meander line in describing grants adjacent to the tidelands (compare Borax, Ltd. v. Los Angeles, supra, and United States v. State of Washington, supra), a withdrawal of public land extending one mile inland from a navigable body of water would similarly commence at the meander line.

B. Appellee's brief is written in terms of a grant or patent to public lands while this case involves only a withdrawal of public land. - The question here involved is not as appellee states at O. Br. 12,"the extent of the public lands where the lands border on navigable waters subject to the ebb

and flow of the tides." No issue as to the "extent of the public lands" is involved at all. The question properly stated is what land was withdrawn from homestead entry by P.L.O. 576.

The problem facing the court, then, is nothing more than a construction of Public Land Order 576. Viewed in this manner, all of appellee's Argument II C (O. Br. 16-18) speaking of "private owner's rights after patent" becomes irrelevant. All of his discussion concerning "patents from the United States" (O. Br. 17), "grants" by the United States (O. Br. 17), and the "rights of owners already existing" (O. Br. 17), is indicative of appellee's inability to distinguish between the legal effect of a patent granting public lands bordering a navigable body of water, however described, and a withdrawal of land from the public domain.

The fallacy of appellee's charge of inconsistency (footnote 3, O. Br. 16) proves our point. Just as for administrative purposes the patent describing rights stops at the survey or meander line but in effect carries ownership rights beyond to the tidelands, the land order here, withdrawing land to a distance one mile inland along a navigable body of water, commences at the survey or meander line, but has the additional effect of withdrawing the area between the meander and the tidelands.

II

OTHER UNRESPONSIVE ASPECTS OF THE OELSCHLAEGER BRIEF

All of Argument I (O. Br. 7-9), concerning the right of one who has entered public lands to a patent, is not applicable here, since the Secretary has determined that the land entered by Oelschlaeger was withdrawn from the Public Domain in 1949. That a settler cannot attain rights on land withdrawn from homestead entry is axiomatic. Wilcox v. Jackson, 13 Pet. (38 U.S.) 498 (1839); Easton v. Salisbury, 21 How. (62 U.S.) 426 (1858); United States v. State of Minnesota, 270 U.S. 181, 206 (1926).

Appellee's Argument II (O. Br. 10), urging that the phrase "line of mean high tide has a distinct meaning in law," ignores the contradictions appearing on the face of the order when the construction which he advocates is employed. Appellee's brief treats neither the "meander corner" wording of the order (Udall Br. 15-16) nor the distances contained in the order (Udall Br. 16-19). As pointed out in appellant's opening brief, these facets of P.L.O. 576 create ambiguities on the face of the order causing it to admit of only one reasonable construction.

Finally appellee makes much of the fact that patents to Thomas Mely and Lewis Oelschlaeger (stepfather of the appellee) were issued within the area withdrawn after the filing of the official survey of this area (O. Br. 2, 20). The record provides the key to an explanation of this sequence of events. Both Mely and Lewis Oelschlaeger entered this area in 1949 (JA 19, 21). Both submitted their proof of homestead at approximately the same time. The decision to ultimately grant Mely his patent was made on September 3, 1953 (JA 21), and the determination to grant the Lewis Oelschlaeger patent the same month, September 29, 1953, was based on the Mely determination (JA 19).

It must be remembered that the volume of public land administration handled by the Anchorage Land Office does not permit the scrutiny and comparison of rights that is taking place in this case. Admittedly the determinations to grant these patents in 1953 were erroneous, but once that determination was made the issuing of the patents was merely a ministerial act on the part of subordinates in the Anchorage Land Office. The fact that a delay of almost three years took place before issuance is explained by the waiting period

prescribed by the applicable homestead statute (43 U.S.C. sec. 371)—

> [A]nd, if after the expiration of the period of three years, or at such date as the settlor may desire to commute, the public surveys of the United States have not been extended over the land located, a patent shall nevertheless issue for the land included within the boundaries of said location as thus recorded, * * *

A delay of six to ten months after the official survey was filed on December 22, 1954, would reasonably be due to administrative backlog. The application in this case was not rejected by the Anchorage Land Office until 23 months after the official survey was filed (JA 18,22).

CONCLUSION

The order of the district should be vacated and its judgment denying appellants' motion for summary judgment reversed.

Respectfully,

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